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PRACTICAL TREATISE  
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M O R T G A G E S.

---

By JOHN PATCH,  
ESQ.  
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

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*LONDON:*  
PRINTED FOR JOSEPH BUTTERWORTH AND SON,  
LAW BOOKSELLERS, 43, FLEET-STREET:  
AND J. COOKE, ORMOND QUAY, DUBLIN.

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1821.



MS. A. 18. 6. 3. 2

## P R E F A C E.

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AS an apology to the Profession for troubling them with the present performance, the Author has to observe, that he has been so well aware of the difficulties of his undertaking, and of the importance and utility of his subject, that he has spared no pains to make his Work either correct or complete. His endeavour has been that the writing should be precise and clear, the arrangement scientific and obvious, and the several parts which serve for reference sufficiently comprehensive and exact. He believes that few cases or decided points falling under the head of his subject have escaped his attention. Wherever he thought the law doubtful, or wherever he thought that a case admitted of explanation, he has stated his sentiments; in which he has been the more imboldened, because it has always been under the impression, that the effect of his observations must depend entirely upon

MS. A. 18. 6. 3. 2

their truth. If he has fallen into any errors, or been guilty of any omissions, he hopes that he has at least shewn himself entitled to some share of the Reader's candour and indulgence.

2, Pump Court, Temple,  
Nov. 19, 1821.

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## ERRATA ET ADDENDA.

- Page 82, l. 9. Add, "But if a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. Per Lord Chancellor Eldon, *Berney v. Sewell*. 1 Jac. and Wal. 648."
- l. 13. Add,—“But a second mortgagee or incumbrancer may have a receiver appointed if the mortgagee in possession confesses that nothing is due, or refuses to accept what, according to his own demand, he states to be due. *Berney v. Sewell*, 1 Jac. and Wal. 647.”
- n. (s) Add,—“Laid down as above per Lord C. Eldon, 1 Jac. and Wal. 648.”
- 83, n. (x) Add,—“And *Brooks v. Greathed*, 1 Jac. and Wal. 176, 178.”
- 157, at the end, add,—“A mortgagee in possession, without notice from the second mortgagee, paying over the surplus rents to the mortgagor, is not accountable for the by-gone rents to the second mortgagee. But, after notice given him by the second mortgagee, the first mortgagee is answerable to the second. *Berney v. Sewell*, 1 Jac. and Wal. 650.”

Page 162, after line 22, add,—“ If a lord of a manor mortgage the manor, and then purchase copyholds held of the manor, which are surrendered to him in fee, the lord cannot afterwards grant out those copyholds so as to sever them from the manor ; for, if his estate be considered at law, he is only tenant at will, or at most from year to year, to the mortgagee after the condition forfeited, and none but a tenant in fee can sever copyholds. And though in equity he is tenant in fee of the manor subject only to the charge, yet he can do nothing to diminish the security ; and the mortgagee has a right to the services, quit-rents, escheats, forfeitures, and other casualties. Doe dem. Gibbons, v. Pott, Doug. 710.”

223, l. 21. Add,—“ But because it was doubtful whether this provision was not confined to the bonds or covenants of the mortgagors or grantors themselves in such securities, wherefore it has been enacted by the 1 and 2 Geo. 4. c. 51, that the bonds and covenants of third persons, which have been, or which hereafter may be given in Great Britain or elsewhere, as a collateral security for the repayment of any money *bonâ fide* advanced on mortgage or security of lands or property in Ireland or the West Indies, shall be good and effectual, provided that no more than six per cent. per annum be received or taken on any such mortgages, bonds, or securities.”

258, after l. 25, add,—“ But if one mortgages, and then devises the mortgaged estate, and also all his personal estate to one and dies, and afterwards the devisee dies without having paid off the mortgage, and intestate, the heir of the devisee will have no right to have the estate exonerated out of the assets of the mortgagor, come to the personal representatives of the devisee, but must take the land *cum onere*. Scott v. Beacher, 5 Mad. 96.”

288, n. (o), Instead of—“ See ante. 11 Ves.” read “ See note (b), 11 Ves.”

303, n. (c), Add—“ S. C. Appendix, No. 1.”

306, l. 26. For “ Therefore,” read “ So.”

307, n. (n), Add—“ S. C. Appendix, No. 1.”

312, n. (l), Add—“ S. C. Appendix No. 2.”

319, l. 3 from bottom, for—“ claims these in deed ; are” read “ claims—These indeed are.”

327, l. 10, erase—“ and Cadogan v. Kennet.”

351, n. (z), Add,—“ And see ante, 321.”

452, l. 36. For “ 1817,” read “ 1816.”

A

## PRACTICAL TREATISE

ON THE

# LAW OF MORTGAGES.

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### CHAPTER I.

#### OF A MORTGAGE.

**W**HERE one conveys land to another to hold to him in fee, or for any other determinate period, with a proviso that the conveyance shall be void, or that the grantee shall reconvey if the grantor pays to the grantee a certain sum of money on a day agreed upon, such conveyance is called a mortgage. (a) And according to Glanville, (b) and Spelman, (c) it is so called, because between the time of making the conveyance and the time appointed for payment of the money, the grantee by the old law received the rents of the estate to his own use, that is, the rents were dead, or lost to the grantor or mortgagor.

(a) Litt. sec. 332.

(c) Gloss. *sub voce mortuum*

(b) Book 10. ch. 6. Beame's *vadium*.

Glanv. 252, 253.

As to him, therefore, the security was from the first a *mortuum vadium*, mortgage or dead pledge. Which mode of accounting for the name of *mortgage* I conceive to be better than that adopted or given to us by Littleton, viz. that after the condition forfeited the *land* was lost or dead to the mortgagor. (d) Not only, as it is directly opposed to *vivum vadium*, which is a security in which the rents never die, that is, in which the rents are continually paying off or diminishing the debt; (e) but because it opens to us more immediately the intention, which a mortgage was meant to effectuate. For I think we may very fairly attribute the introduction of mortgages to the doubt which formerly prevailed respecting the legality of taking interest. Which being altogether forbidden by the law, this conditional alienation was introduced, not so much with a view that the property might be lost to the mortgagor if he failed to repay the money; but in order that the mortgagee might receive the rents in the mean time to his own use in lieu of what he would otherwise have received under the name of interest or usury. Therefore Glanville informs us that this species of security was considered usurious. (f) And being so considered, the courts of law, it is natural to suppose, would not assist a mortgagor, who was party to the usurious contract after the condition forfeited; but left him to all the legal consequences of his neglect. And even when the statute of the 37 Hen. VIII. c. 9. had made the taking of moderate interest lawful, the courts of law could not look upon mortgages in any other light than that of conditional alienations, without at the same time reflecting upon their former decisions. But then equity interposed; and, reverting to the intention of the parties, which was certainly no more than to give a security for

(d) Sec. 332.

(e) Co. Litt. 205. a.

(f) Book 10. ch. 8. Beame's

Glanv. 257, 258.

the loan, with interest in the mean time, held, that the mortgagor should be at liberty to redeem his lands, even after the condition forfeited, upon payment of principal, interest, and costs. (g)

A mortgage, pledge, and lien, have been thus distinguished. A mortgage is a pledge to become an absolute interest, if not redeemed at a certain time. But a deposit of personal effects not to be taken back but on payment of a certain sum, if by express stipulation, it is a pledge; if by the course of trade, it is a lien. For a lien does not arise out of any contract whatsoever; but out of a right to hold property till the party claiming the lien has been paid for the operation he performs. A person having the right of lien has no right to sell the goods: but a person holding a pledge has, if the money be not repaid according to the agreement. That being on account of their perishable nature, and unproductiveness, the only way of repaying himself. And the contract to be inferred on such occasions being to the following effect:—"If I (the borrower) repay the money, you must redeliver the goods: but if I fail to repay it, you may use the security I have left to repay yourself." (h)

To constitute a valid mortgage, there must be a mortgagor, a mortgagee, and a thing to be mortgaged.

*Of the mortgagor and mortgagee.*—The same persons may sustain the characters of mortgagor or mortgagee, as may sell or purchase the several sorts of property intended to be mortgaged. Therefore, aliens, corporations, infants, idiots, lunatics, persons deaf dumb and blind *a nativitate*, persons under duress, persons attainted of treason, felony, or præmunire, papists, and feme covert, have the same capacity of being mortgagors or

(g) 3 Blackst. Com. 434, 435. 645. *Pothonier v. Dawson*, 1 Holt

(h) *Jones v. Smith*, 2 Ves. jun. 385.

378. *Wilson v. Heather*, 5 Taunt.

mortgagees, as they have of being vendors or purchasers, and labour under the same disabilities ; a mortgage being most truly a sale *pro tanto*.

*Of things to be mortgaged.*—There is no species of property, real or personal, corporeal or incorporeal, vested or contingent, in possession or expectancy, of inheritance or not of inheritance, legal or equitable, which may be granted or conveyed away, that may not be granted or made over for the purpose of a mortgage. (i) An estate at will is determined by being assigned ; consequently, cannot be mortgaged.

A mortgage may be made by any species of deed or assurance that will serve to convey or charge the property intended to be mortgaged ; whether it be a conveyance or assurance deriving its effect from the common law or statute of uses, and whether perfected in pais, or by matter of record.

A mortgage may be made in fee, in tail, for life, or for years. (k)

The greatest division of mortgages is into mortgages in fee, and mortgages for years. As long terms for years are of later original, it is no great presumption to suppose mortgages in fee were at first more common : but it having formerly been a doubt whether, by taking such estate in fee, it did not become liable to the wife's dower, and other incumbrances of the mortgagee, (l) it therefore became usual to grant only for a long term of years by way of mortgage ; which was thought to have this further advantage, that on the death of the mortgagee the estate became vested in the personal representatives who have the better claim to the money lent. (m) But afterwards when the doubts occasioned by taking the estate in

(i) Glanv. Lib. 10. c. 6.

190.

(k) Lit. sec. 333.

(m) 2 Blackst. Com. 158.

(l) Nash v. Preston, Cro. Car.



fee, as to its becoming liable to the incumbrances of the mortgagee, were removed by our courts of equity ; when it was settled that the claim of the personal representative to receive the money lent should in all cases be preferred ; and when the inconvenience arising from the estate falling into the hands of an infant heir, an idiot, or a lunatic, were removed by allowing them to reconvey on payment of the mortgage money ; then mortgages in fee became more usual ; and the reason given for their preference is, because they take the estate completely out of the mortgagor. The convenience of this practice is evinced in those cases where the equity of redemption is foreclosed. On the other hand, when a mortgage is taken by a grant for years, in order to remedy the only inconvenience attending it, it is a very common practice to insert a covenant from the mortgagor, that he will on default made in payment of the mortgage money, according to the condition, do all acts for absolutely assuring the fee to the mortgagee. (*n*) The exposition of which covenant given by Holt, C. J. is, that the further assurance must be absolute ; but that it does not oblige the mortgagor to release his equity of redemption, nor is a warranty necessary in such further assurance. (*o*)

The proviso for redemption in mortgages is, that on payment of the money borrowed with interest the estate granted shall be void ; or that the mortgagee shall reconvey to the mortgagor, or as he shall appoint. Either mode is equally good ; only, considering how seldom the money is paid on the day appointed, the latter seems preferable.

The time for payment of the money is by the condition generally limited to a year after the date of the mortgage : but it may be for a greater or a less space of time. If the

(*n*) Bac. Abr. tit. Mortgage, (A.) 633.      (*o*) Atkins v. Uton, Comberb. 318. 1 Lord Raym. 36.

money be not paid at the day appointed, the condition is gone, and the interest of the mortgagee in the lands pledged becomes absolute at law. He may from thenceforth hold it as his own; may mortgage, sell, devise, and exercise over it every power of ownership. And it shall pass by the same legal conveyances, and in the same manner precisely, as if it had been his own entire purchase. But equity, considering the mortgage as a pledge only for the debt and interest, will relieve against this forfeiture at law; and will allow the mortgagor to redeem, if he applies within any reasonable time.

This reasonable advantage allowed to mortgagors is called an equity of redemption. And so jealous are the courts of equity of their jurisdiction in this behalf that they will not suffer the equity of redemption to be restricted by any proviso or agreement to the contrary. For a man shall not have interest for his money, and a collateral advantage besides for the loan of it; or clog the redemption with any bye agreement; since this would be to let in all manner of extortion and usury. (*p*)

Thus a proviso to redeem during the life of the mortgagor only, (*q*) or during the joint lives of mortgagor and mortgagee only, (*r*) and a proviso to restrain the right of redemption to the mortgagor and his heirs male, (*s*) have been set aside in favour of those entitled to redeem. And so a proviso that if the money be not paid by a certain time, that the conveyance shall become absolute; (*t*) or shall become absolute on payment of a further sum of

(*p*) *Jennings v. Ward*, 2 Vern. 520.

Rep. 55.

(*q*) *Jason v. Eyres*, 2 Cha. Ca. 33. 2 Freem. 69. S. C. *Kilvington v. Gardner*, cited 1 Vern. 192.

(*s*) *Howard v. Harris*, 1 Vern. 33. 190. S. C. 2 Ch. Ca. 147.—  
2 Freem. 86. S. C. *Anon.* 2 Freem. 84.

*Price v. Perrie*, 2 Freem. 258.

(*t*) *Bowen v. Edwards*, 1 Cha.

(*r*) *Spurgeon v. Collier*, 1 Eden's

Rep. 222.

money by the mortgagee; (*u*) will not be allowed in equity. Much less shall an agreement entered into between third persons, as the creditors of a mortgagor and the mortgagee, or his assignees, to restrain the right of redemption, be valid. (*w*)

The proviso for redemption is generally contained in the mortgage deed: but the estate will be equally redeemable if the mortgage be made by an absolute conveyance with a defeazance or agreement for redemption in a separate deed. (*x*) The latter mode, however, is discountenanced by the Courts. In one case Lord Talbot declared that he would discourage the practice as much as possible. That to him it always appeared with a face of fraud; for the defeazance might be lost, and then an absolute conveyance be set up. (*y*) And in another case, Lord Hardwicke is made to say that the not inserting the clause in the deed was an imposition on the mortgagor. (*z*) And the truth of these declarations is fully evinced by the above cited case of *Spurgeon v. Collier*, where the mortgagee, to prevent the redemption, corrupted the son to rob the father of the deed of defeazance, and to put it into his hands; and then procured him to be imprisoned, first in a gaol, and then in a private house, to prevent his looking into his affairs.

Where a mortgage is made by an absolute conveyance, and a defeazance prepared at the same time, but which the mortgagee afterwards refuses to execute; (*a*) or if, upon an agreement to mortgage, the mortgagee pre-

(*u*) *Willett v. Winnell*, 1 Vern. 488. 1 Eq. Ca. Abr. 313. pl. 14. S. C. *Price v. Perrie*, 2 Freem. 258.

(*w*) *Exton v. Greaves*, 1 Vern. 138.

(*x*) *Manlove v. Bale and Bruton*, 2 Vern. 84. *Croft v. Powell*, Com. Rep. 603.

(*y*) *Cottrell v. Purchase*, Cases temp. Talb. 64.

(*z*) *Baker v. Wind*, 1 Ves. 161.

(*a*) *Maxwell v. Montacute*, Cha. Prec. 526. *Walker v. Walker*, 2 Atk. 99. *Young v. Peachy*, 2 Atk. 258. *Jones v. Statham*, 3 Atk. 388. Cha. Prec. 103, 104.

pared an absolute conveyance without a proviso for redemption; (b) parol evidence will be admissible to shew the intention of the parties on account of the fraud.

But a parol agreement, or a mere verbal declaration that a conveyance seemingly absolute is intended for a mortgage only, will not, since the statute of frauds, be of any avail. (c) But if there be any other evidence to explain the nature of the transaction, it will be very readily admitted. As where an absolute conveyance is made for such a sum of money, and the person to whom it is made, instead of entering and receiving the profits, demands interest for his money, and has it paid him. And a letter has been held a sufficient agreement in writing, if it were signed by the party to take it out of the statute. (d) So if the mortgagee gets an absolute deed, but suffers possession to go sometime contrary to it, it will again make it but a mortgage. (e) And a grantee's having exhibited a bill against the grantor for the land, or the money, is proof that the conveyance was intended for a mortgage. (f) So where the mortgagor was prevailed upon to sign an absolute conveyance without any note of defeazance, relying on the promise of the mortgagee, and his agent, that he might redeem on payment, which was admitted by the mortgagee in his answer, the decree was for a redemption with costs against the mortgagee. (g)

(b) 3 Atk. 389.

(c) 29 Car. 2. c. 3. *Perry v. Marston*, 2 Bro. C. C. 397. The case of *Copleston v. Boxwill*, 1 Cha. Ca. 1. was before the statute. 3 Salk. 241. *Hare v. Shearwood*, 3 Bro. C. C. 168. *Powell on Mortgages*, 156. and see the cases cited in the last note but one; and see *Irnham v. Child*, 1 Bro. C. C. 92. <sup>a</sup> *Mortmore v. Morris*, 4 Bro. C. C. 219.

(d) Prec. Cha. 526. *Foxcroft*

*v. Leicester*, Colle's P. C. 108. 2 Vern. 456. *Gilb. Rep.* 4. 11. *Vernon v. Bethell*, 2 Eden's Rep. 110.

(e) *Harris v. Horwell*, *Gilb. Rep.* 11.

(f) *Bowen v. Edwards*, 1 Cha. Rep. 222.

(g) *England v. Codrington*, 1 Eden's Rep. 169.

So a conveyance seemingly absolute, but expressed to be made in consideration of money *lent* or *borrowed*, or for securing the *payment* of money, cannot be other than a security. Or if there be written evidence that the agreement stated by the deed is incorrect, then parol evidence will be admitted to shew the real intention of the parties. (*h*) Inadequacy of consideration too has been held sufficient to relieve against the letter of an absolute conveyance, if there be any other circumstance to aid the admission, as the relative situation of the parties as trustee and *cestui que trust*, (*i*) the grantor's being an heir, dealing for an expectant interest in the lifetime of his father; (*k*) the weakness of the grantor's understanding, (*l*) or his distress, (*m*) or if there be any gross fraud on the part of the grantee. (*n*) But inadequacy of consideration alone is not a ground for setting aside a conveyance. (*o*) And in all cases where a conveyance is set aside on any of the grounds abovementioned, it is treated as a mortgage; and the grantor as a mortgagor coming into equity to redeem; so that the money really paid by the grantee must be repaid with interest, and all monies

(*h*) *Cripps v. Jee*, 4 Bro. Cha. Ca. 472. *Irnham v. Child*, 1 Bro. C. C. 92.

(*i*) *Herne v. Meeres*, 1 Vern. 465. S. C. 2 Bro. C. C. 176. *n*. *Purcell v. M'Namara*, 14 Ves. 91.

(*k*) *Nott v. Hill*, 1 Vern. 167. 2 Vern. 27. *Gwynne v. Heaton*, 1 Bro. C. C. 1. *Twisleton v. Griffith*, 1 P. Wms. 310. *Barkney v. Tyson*, 2 Vent. 359. S. C. 2 Vern. 14. *Barnardiston v. Lingood*, 2 Atk. 133.

(*l*) *Gartside v. Isherwood*, 1 Bro. C. C. 558. *Clarkson v. Hanway*, 2 P. Wms. 203. *Purcell v.*

*M'Namara*, 14 Ves. 91. *Osmond v. Fitzroy*, 3 P. Wms. 129.

(*m*) *Heathcote v. Paignon*, 2 Bro. C. C. 167. *Purcell v. M'Namara*, 14 Ves. 91. *Sutherland v. Northmore*, Dick. 56.

(*n*) *Ardglass v. Muschamp*, 1 Vern. 237. *Ardglass v. Pitt*, *ibid.* 239.

(*o*) *Batty v. Lloyd*, 1 Vern. 141. *Griffith v. Spratley*, 2 Bro. Cha. Ca. 179. *n*. *Mac Ghee v. Morgan*, 2 Scho. and Lef. 395. *n*. *Low v. Barchard*, 8 Ves. 133. *Moth v. Atwood*, 5 Ves. 845.

which he may have paid for insurance must also be repaid with interest from the time of payment, and the expence of the deeds ; and the grantee will, unless his conduct be such as to require a difference, be entitled to his full costs. And in the mean time the deeds will remain a security for such payments. (*p*) And in all these cases it is necessary that the grantor should pursue his remedy within a reasonable time, or he will lose his remedy by his acquiescence. Twenty years, and in some cases less time, has been holden a sufficient bar. (*q*)

The principle upon which equity relieves the mortgagor after the condition forfeited is this, that it considers the transaction as a security only for the payment of money. (*r*) And, therefore, where it has been made to appear that at the time of the original contract the parties had some further view, as, if the money was not paid, to settle the estate in a particular manner, or to benefit third persons, or the mortgagor intended the mortgagee a kindness ; the Court has refused to interfere. (*s*)

So a devise to one, if a certain sum is not paid off according to a covenant, in the opinion of Lord Hale was an absolute devise if the money be not paid, (*t*) a devise always implying a bounty. Though where a testator devised to his daughter in fee, and if his son paid her 50*l*.

(*p*) *Twisleton v. Griffith*, 1 P. Wms. 310. *Gwynne v. Heaton*, 1 Bro. Cha. Ca. 1. and see the cases cited in notes *i k l m* and *n. supra*.

(*q*) *Morony v. O'Dea*, 1 Ball. and Beat. 109. *Gregory v. Gregory*, Coop. Cha. Ca. 201. *Morse v. Royal*, 12 Ves. 355. 2d Point.—*Moth v. Atwood*, 5 Ves. 845.—*Mellor v. Lees*, 2 Atk. 494. *Floyer v. Lavington*, 1 P. Wms. 268.

(*r*) *Clench v. Witherby*, Rep. temp. Finch 376.

(*s*) *Bonham v. Newcomb*, 2 Vent. 364. S. C. 1 Vern. 7. 214. 232. S. C. 2 Cha. Ca. 58. 159. 2 Freem. 67. *King v. Bromley*, 2 Eq. Ca. Abr. 595. See also 1 Vern. 193. at the bottom of the page.

(*t*) *Wolstan v. Aston*, Hard. 511. Entered with an adjournatur. *Sir T. Man's case*, 2 Freem. 206.

he was to have the land, the son made default in payment on the day appointed. It was decreed in favour of the son, Finch, Chancellor, taking it in the nature of a *security*. Yet it was objected that it was a contingent devise to the son on payment. And the reporter adds, quære, *sibene*. (u) Mr. Viner in his Abridgment, after citing the case of *Bland v. Middleton*, and noticing the reporter's quære thereon, observes, that it was said by Lord Macclesfield, that in all cases, where there is a measuring cast, (as he termed it,) between an executor and a heir, the latter shall in equity have the preference. And why (he asks) may it not be the same between a heir and a devisee? To this it may be replied, that in those cases where there is a measuring cast, the testator, either by silence or ambiguity, has left it to the law to determine which shall have the preference; but where the devisee and heir are both expressly mentioned, it shews that both their interests have been contemplated; and the measuring cast, if any, between them is in favour of the prior devisee; for the testator, by placing him first in the devise, has evidently shewn him a preference. And that the devise to the heir would at this day be construed conditional according to the opinion of Hale in *Wolstan v. Dunstan* may be further gathered from the decree of the Master of the Rolls in a later case. Where a testator had devised lands to his wife for life, remainder to his daughter and her heirs; but directed that if his son paid to his daughter 500*l.* after his wife's death, the lands should go to him and his heirs. On a bill brought by the daughter to compel the son to pay this 500*l.* within a reasonable time, or be foreclosed, Sir Joseph Jekyll, indeed, so far likened the case to a mortgage that he decreed the defendant should pay interest for the 500*l.* and was entitled to an account

(u) *Bland v. Middleton*, 2 Ch. pl. 12. and margin.  
Ca. 1. Vin. Abr. tit. Devise (A. b.)

of the rents and profits; that it was the case of every mortgagee, and that *there* might be a foreclosure: but he goes on to observe, that the defendant had not his life to pay the money in, but only a *reasonable time* after the mother's death. Which shews that he drew a very evident distinction between a mortgage and this devise. (x) And in a case in Chancery, which seems to have been very fully considered, where a testator devised to his wife for life, and after her death to his son D. and his heirs, provided that if N. (the testator's second son,) did, within three months after the wife's death, pay to D. 500*l.* then the lands should come to N. and his heirs. And N. died in the wife's lifetime. Though the heir of N. having brought his bill within three months after the wife's death, was admitted to perform the condition; yet the ground of the determination was on the descendible quality of the condition. And it was neither urged by the counsel, nor noticed in the decision, that the interest of D. was in nature of a security. (y) But upon this point Sir Thomas Mann's (z) case seems decisive. A testator devised lands to his eldest daughter, paying 100*l.* to the second daughter; and, if the eldest daughter did not pay by such a day, then he devised the lands to the second daughter. It was resolved this was not in nature of a mortgage to be redeemable after the time of payment was over, but that the eldest daughter not paying at the time appointed, the second daughter should have the land, and the eldest had no relief.

Again, as equity relieves the mortgagor after the condition forfeited, on the ground that it considers the transaction as a loan only, it has refused its aid where it can be satisfied that a conveyance, when originally made,

(x) *Dunscomb v. Dunscomb*, 486. S. C. 10 Mod. 419.  
Moseley 130.

(y) 2 Freem. 206.

(z) *Marks v. Marks*, Cha. Prec.



was an absolute conveyance, subject only to an agreement enabling the person making it to repurchase within a limited time. Whether such conveyance be a release of the equity of redemption, after a mortgage (*a*) or an absolute conveyance in the first instance, subject only to the agreement to repurchase. (*b*) So that wherever there is a clause or provision to repurchase, the condition must be strictly performed.

The grantee's having paid the full value for the estate, having had uninterrupted possession for a length of time, the money to be paid for repurchase being the amount of the purchase-money, or a fair consideration for the improvement likely to take place in the estate by its having been in the grantee's hands, and the power of repurchasing being left to the option of the grantor, are the best proofs that a conveyance is intended to be a conditional purchase.

But the want of any of these circumstances is by no means decisive against the conveyance, as is frequently evinced in annuity transactions, where the clause for repurchase being at an advance, has notwithstanding been held good. (*c*) Lord Hardwicke, however, has expressed himself somewhat against clauses for repurchase: "There is a distinction," says his lordship, "in the nature of the transaction, between a power of redeeming and of repurchasing, obtained by usage, which governs the sense of words. But it is well known that the Court

(*a*) *Cotterel v. Purchase*, Ca. Temp. Tab. 61. *Endsworth v. Griffith*, 15 Vin. Abr. 468. pl. 8. 2 Eq. Ca. Ab. 595. pl. 6. 1 Brown's Parl. Ca. fol. ed. 149. 8vo ed. 5th vol. 184.

(*b*) *Barrell v. Sabine*, 1 Vern. 268. *Floyer v. Lavington*, 1 P. Wms. 268. *Mellor v. Lees*, 2 Atk.

494. *Tasburgh v. Echlin*, Bro. P. C. fol. ed. vol. 4. 142. 8vo. ed. vol. 2, 265. *Goodman v. Grierson*. 2 Ball and Beat. 274.

(*c*) *Murray v. Harding*, 2 Black. 859. S. C. 3 Wils. 390. *Verner v. Winstanley*, 2 Scho. & Lef. 393. *Metcalf v. Brown*, 5 Price 590.

“leans extremely against contracts of this kind, where  
 “the liberty of repurchasing is made at the same time  
 “concomitant with the grant, as it must be considered in  
 “this case, being part of the same transaction ; the Court  
 “going very unwillingly into that distinction, and endea-  
 “vouring, if possible, to bring them to be cases of re-  
 “demption. Although it be a different thing where the  
 “contract for liberty to repurchase is after a man has  
 “been some time in possession of an estate, and acting  
 “as owner under a purchase.” (d)

In a case which arose in Ireland, where the practice is on a bill of foreclosure, always to decree a sale, the circumstances were, that A. having lands subject to a portion of 1000*l.* charged on them in favour of B., conveyed to trustees for B., in *lieu* and *satisfaction* of the said sum of 1000*l.*, subject to redemption if he should within ten years pay the said 1000*l.* ; there being neither bond nor covenant for payment. Manners, Chancellor, held that as the grantee would be without remedy if the sale did not produce sufficient to pay the 1000*l.* and costs ; for he could not proceed on his covenant or bond, there being none, nor upon the implied assumpsit, for the conveyance had been taken, not as a security, but expressly in *lieu* and *satisfaction* of the portion of 1000*l.* ; that the deed must be held a conditional sale ; and the time for payment being elapsed, the grantor could have no relief. (e)

There are instances of mortgages made with a proviso for redemption on a certain day in any year, as on Michaelmas day next ensuing, or any subsequent Michaelmas-day, with an agreement that the mortgagee shall till payment receive the rents in lieu of interest, but without any covenant for payment. So that the mortgagee has

(d) *Longuet v. Scawen*, 1 Ves.  
405, 406.

(e) *Goodman v. Grierson*, 2  
Ball & Beat. 274.

no means of enforcing payment or a foreclosure. (*f*) Where this is the case, the conveyance is called a *Welsh* mortgage, owing to its having been the common practice in Wales to make mortgages in this manner, with the design of keeping the estate for ever in their own families.

It is the modern practice in mortgages to insert a covenant from the mortgagor for himself, his heirs, executors, and administrators, to pay the money borrowed, with interest. And unless a bond be given at the time of the mortgage to pay the mortgage money and interest, such a covenant should never be omitted. To the mortgagee it is beneficial, inasmuch as it creates a personal contract between him and the mortgagor for the payment of the money. (*g*) And on the part of the mortgagor it is a proper precaution; for, let a conveyance be made in what shape or words soever, such a covenant will be deemed explanatory of the intention of the parties, and will reduce it to a simple mortgage. (*h*) But, in order to constitute a mortgage, there is no necessity for a covenant to pay; (*i*) nor is it requisite that the rights of the parties, that is, of the mortgagee, to compel payment and of the mortgagor to compel a redemption, should be mutual. (*k*)

Where, in addition to a mortgage, a bond is given, it should be simply conditioned for the payment of the money, and not be for the performance of the stipulations in the mortgage deed, as it may save difficulty in the

(*f*) *Howel v. Price*, Cha. Prec. 423, 477. S. C. Gilb. Rep. 106. S. C. 1 P. Wms. 291. S. C. 2 Vern. 701. 1 Vern. 477.

(*g*) 1 Cru. Dig. 87. 1 Eden's Rep. 211, at the top of the page.

(*h*) *Howard v. Harris*, 1 Vern. 190.

(*i*) *King v. King and Ennis*. 3

P. Wms. 358. 2 Atk. 496. 3 Atk. 280.

(*k*) *Arguendo* in *Tallot v. Braddil*, 1 Vern. 395. And by Sir J. Jekyl in *Floyer v. Lavington*, 270, 271. See *Howel v. Price*, *ubi supra*, and the cases cited in the last note.

pleadings; (*l*) for the same reason, a covenant for payment should not be by reference to the proviso. But a bond for the performance of all covenants and conditions contained in the mortgage-deed will be forfeited by non-payment of the money according to the proviso, (*m*) though if it be for the performance of covenants, payments, articles, and agreements, and there be no covenant to pay, it has been held to be otherwise. (*n*)

The covenants for title in mortgages are generally absolute, that is, made to extend to the acts of all the world, (*o*) and not, as in purchase-deeds, confined to the acts of the vendor, or those under whom he claims by descent, voluntary settlement, or devise. The efficacy of such absolute covenants in extending to all defects of title of which the purchaser is ignorant, (and a mortgagee is a purchaser *pro tanto*,) has never yet been questioned. (*p*) And when it is considered how often a mortgage is, as it were, a desperate purchase, a plank in the shipwreck, snatched at by the mortgagee without any previous investigation of title, or the means of ascertaining its stability; at other times how that the validity of title is disregarded, owing to the confidence reposed in each other by the parties, or the seeming amplitude of the security, it may be safely laid down, that the covenants for title in mortgages should always be absolute. Even when the mortgagor submits his title for approbation, it seems he cannot object to enter into these unrestrained covenants, as he can always discharge himself from the hardship of their ex-

(*l*) Powell on Mortgages 22.

(*m*) Tooms v. Chandler, 2 Lev. 116. 3 Keb. 387.

(*n*) Briscoe v. King, 2 Cro. 281.

(*o*) That such covenants are good, see Howell v. Richards, 11 East. 633. Hesse v. Stevenson, 3 Bos. & Pull. 565.

(*p*) That covenants will not extend to defects of which the purchaser is conusant, see Butler's note to Co. Lit. 384 (*a*). Urmston v. Pate, Chan. 1 Nov. 1794. stated in Sugd. on Vend. and Pur. 388, 4th ed. and 4 Cru. Dig. 90. s. 64.

tent by paying off the money. Where the mortgagee has power, in default of payment, to sell, or the security is made by a conveyance upon trust to sell, as hereafter mentioned, there is not the same necessity for absolute covenants; nor does it seem reasonable that the borrower of money should enter into them, as the purchaser under those deeds will be entitled to the benefit of those covenants. As a subsequent purchaser may, in the course of the transmission of title, take advantage of the covenants of the prior vendors; (q) and the borrower of the money in such case, after a sale, will become only a vendor in the link of the title. Of course these observations cannot apply to those cases where the borrower joins in the sale, and enters into a fresh set of more restrictive covenants.

It is very much the practice in modern times to insert in the mortgage-deed a proviso, that if the money shall not be paid at the day appointed, it shall be lawful for the mortgagee to sell the estate, and out of the money arising by the sale to deduct his mortgage-money and interest, and the expenses of the sale. Where, from the circumstances of the mortgagor, there is any reason to suspect that the mortgagee will be put to any trouble or expense in recovering his mortgage-money, the insertion of such a clause seems highly advisable. And whatever doubts might have been formerly entertained with respect to such a clause, (r) yet its validity is now fully established. (s) But while the doubt remained, a method of conveyance

(q) *Middlemore v. Goodale*, 1 to 19. 1 East. 291.

Roll. Abr. 521. (K.) pl. 6. Cro. Car. 503, 505. Sir Wm. Jones, 406. Vin. Abr. Covenant, K. pl. 6. Butter's note to Co. Lit. 384, a. Sugd. on Vend. and Pur. 453, 4th edit.

(r) See Powell on Mortgages, 14

(s) *Corder v. Morgan*, 18 Ves. 344. *Clay v. Sharpe and Others*, Cha. Mich. Term, 1802. 18 Ves. 346, note; stated also in the Appendix to Mr. Sugden's Law of Vend. & Pur. page 34.

was invented, *(t)* which is still very frequently adopted. The mode last alluded to is effected by a conveyance to some third person, in trust for the borrower, till a certain day ; when, if he pay the money lent and interest, then upon trust, to reconvey the estate to him and his representatives, or as they shall appoint ; but if he make default in payment of the money on the day appointed, then upon trust to sell the estate ; and out of the monies arising by sale, in the first place to deduct the expenses of the sale, then to pay the lender of the money the money advanced and interest, and to pay the ultimate surplus of the trust-money (if any) to the borrower or his representatives.

In either case, whether the sale be to be made by the mortgagee after default, as in the first instance, or by the trustee, as in the last of the above instances, there should be a declaration that their receipts shall be sufficient discharges for the purchase-money. And in both cases it is usual to insert a covenant from the borrower that he will join in sales ; but with a proviso that his joining shall be for the satisfaction only of the purchaser, and not for the security of the title.

The construction of which covenant and proviso will appear from the two cases next mentioned, in both of which they were inserted. In *Clay v. Sharpe* *(u)* where the purchaser brought his bill against the trustee and mortgagor to compel the mortgagor to join, the Court dismissed the bill against the mortgagor ; and in *Corder v. Morgan* *(x)* the Court decreed a specific performance without the joining of the mortgagor against the purchaser. But in neither case does it appear that the mortgagee had requested the mortgagor to join, so that by the rules of equity the mortgagee under the power to sell, coupled with

*(t)* See 3 Barton's Elements of Conveyancing, p. 348, 349, 1st edit.

*(u)* 18 Ves. 346, note.

*(x)* 18 Ves. 344.

the power to give an effectual discharge for the purchase money, could make a good title to the purchaser without the mortgagor's joining. But it should seem that upon a bill filed by the mortgagee, or trustee for sale, against the mortgagor to compel him to join, the Court would, upon the force of the covenant, order the mortgagor to join in a sale; and, if so, the effect of the proviso seems to make the mortgagor's joining optional with the mortgagee or trustee. The proviso that the mortgagor's joining shall not be requisite to perfect the title is inserted in order to throw no impediment in the way of a sale, and to answer the purchaser's objection should he insist on the mortgagor's joining; but can in no way curtail the force of the covenant entered into with the mortgagee or trustee. Without such a construction, the covenant to join would be of no effect; but, with it both the covenant and proviso stand well together.

But, in all cases of a sale by a mortgagee under a power, care should be taken that the conveyance from him be made without any exception of the equity of redemption, or else the estate will remain redeemable in the hands of the intended purchaser. Thus, where a mortgagee having power in default of payment to mortgage or absolutely sell the lands free from redemption, entered into articles of agreement for the sale of the estate, and afterwards conveyed the same to the purchaser, in which articles and conveyance the defeazance, which was by a separate deed, was mentioned and excepted, though it was proved that the mortgagor was privy and consenting to the agreement for sale; yet it was resolved by the Court that the estate was redeemable. (y)

The mode above adverted to of vesting the estate in the first instance in trustees to sell we find, in the opinion of the late Mr. Bradley, was proper to be adopted where the

(y) *Croft v. Powell and Others*, Com. Rep. 603.

money lent was near to the value of the lands, only that he recommends the trust to be either by *mortgage* or sale to raise the money and interest. (z)

It seems that an agreement that in case the estate be to be sold that the mortgagee shall have the right of pre-emption is good. This, though not absolutely decided, is tacitly admitted by the case of *Orby v. Trigg*. (a) There it was decided against the defendant, the mortgagee; but it must have been on the ground of fraud, for it appeared that the mortgagee had got hold of the counterpart of the mortgage, that he had frequently refused to give a copy of it to the plaintiff, insisting only on his principal money and interest till after the estate was sold, and that neither the plaintiff nor purchaser knew any thing of the agreement. Upon principle there can be no objection to an agreement for pre-emption. It is not like the case of clogging the redemption with a bye-agreement. The mortgagor has equal liberty of redeeming as if there had been no such agreement; and he is not obliged to sell to the mortgagee for a less sum than he can get elsewhere.

The method of proceeding to a sale where there is a right of pre-emption is very clearly set forth in *Dyer*. A lease was made containing a proviso that if the lessees or their executors be disposed to sell and alien the term, that the lessor should have the first offer or advancement, he giving therefore as another would give. The report has it thus:—"And then it was moved besides, Whether  
 "the lessees when they are disposed to sell the term, and  
 "come first to the lessor according to the condition, are  
 "obliged by the law at first to say to the lessor, 'Sir, will  
 "you please to have the term? for I. S. will give a hundred pounds for it.' Shelly thought that they are not  
 "bound to do so much, but to ask him generally, whether

(z) Pract. Points, 63.

2 Eq. Ca. Abr. 599. pl. 24.

(a) 9 Mod. 2. S. C.



“ he will give as much for the term as another will : and,  
“ if he shall refuse, they are not bound to shew more to  
“ him. But if he say that he will, then it is necessary  
“ for the lessee to shew in certain what man will give  
“ more. And another question was also asked, ‘ Whe-  
“ ther the lessees are bound to delay their sale if the  
“ lessor when he is examined shall say that he wishes to  
“ pause, or take breath in the matter ?’ And Shelly and  
“ Fitzherbert held that they are not bound to wait so long,  
“ for it may be that another will give him 100*l.* imme-  
“ diately ; and it would not be reasonable to defer the sale ;  
“ but it is necessary for the lessor to say yes, or no, imme-  
“ diately. And so the condition is then determined.” (b)

Mortgages of copyholds are generally made by a deed of covenant to surrender the copyholds, with a proviso that on payment of the money the surrender shall be void. The deed should also contain a covenant for payment of the money, and covenants for the title. When the surrender is made, the surrender and condition should be both entered on the Rolls, the entry of the condition immediately following the entry of the surrender. In like manner, if the condition be contained in a separate deed, the deed of defeazance should be entered on the Rolls of the manor ; because, in addition to the reasons before given of the defeazance being lost, and its seeming fraudulent, the title to the lands should always appear on the Court Rolls of the manor, and not be dependent on any private deeds or agreements. (c)

Sometimes it is stipulated in mortgages, that on regular payment of the interest the money shall remain upon the land for a given period, and such stipulation has been held to be good. (d)

(b) Dyer, 13 b. 14 a.

(d) Stanhope v. Mannors, 2

(c) Watkins on Copyholds, 184. Eden's Rep. 197.

2d edit.

It frequently happens that in mortgages and other securities, the rate of interest is left indeterminate, the money being covenanted to be paid, together with *legal interest*. A mortgagee, under such a covenant, might recover interest at 5 *per cent.*; (e) at the same time there is an apparent generality in the reservation which makes it unadvisable.

Where a bond and warrant of attorney are given at the same time with a mortgage, it seems proper to recite them in the mortgage deed, as it shews more plainly the nature of the transaction, and identifies them for one security. But where there is also a covenant for payment of the mortgage money in the deed, the bond may very easily be dispensed with, and the warrant of attorney be made for entering up judgment in an action of *debt* brought by the mortgagee against the mortgagor. So far as regards it as a real security, a real covenant for payment, and a bond, are equally binding upon the heir, or devisee, under the statute of fraudulent devises; for an action of debt may as well be brought upon a covenant to pay money as upon a bond. (f) And, in point of extent, a covenant real (by which is meant a covenant under hand and seal, in which the covenantor covenants for his heirs,) is a much more comprehensive security; for interest to any amount may be recovered on a covenant, while neither at law, nor in equity, will it be allowed to exceed the penalty of the bond. (g) Where a judgment

(e) See post. on the Interest of Mortgages.

(f) 1 Leon. 208. Chawner v. Bowes, Godb. 217. Gott v. Atkinson, Willes 521. Dyke v. Sweeting, *ib.* 585. Co. Lit. 292. b. That an action of covenant does not lie against a devisee under the 3 W.

and M. c. 14. see *Wilson v. Knubley*, 7 East. 128.

(g) Serjeant Williams's note, (1) Saund. 58. a. *Lloyd v. Hatchett*, 2 Anstr. 525. and the cases cited in *Bridgman's Index*, title Bond, pl. 178.

is entered up on a bond, interest may be recovered on that judgment by way of damages, beyond the penalty. (*h*)

Upon every warrant of attorney to enter up judgment against a mortgagor, there should be a defeazance or memorandum of the agreement of the parties of the terms upon which the judgment shall be. And such defeazance must be made at the time of giving the warrant, or at least previously to the acknowledgment of the judgment; for if a judgment be acknowledged absolutely, and a subsequent agreement made, the Court will take no notice of it, but put the party to his action upon the agreement; whereas, where a judgment is confessed upon terms, it is as it were a conditional judgment: the Court will lay hold of the condition, and see the terms performed. (*i*)

By a rule of the Court of King's Bench made in Michaelmas term, 42 Geo. III. it is ordered, "That every attorney of this Court, who shall prepare any warrant of attorney to confess any judgment which is to be subject to any defeazance, do cause such defeazance to be written on the same paper or parchment on which the warrant of attorney shall be written, or cause a memorandum in writing to be made on such warrant of attorney containing the substance and effect of such defeazance." (*k*) And in Michaelmas term, 43 Geo. III. a similar rule was made by the Court of Common Pleas, and precisely in the same words. (*l*) Upon this last order it has been determined that it is not sufficient that the defeazance set forth the amount of the sum intended to be secured by the judgment; but that it must also state all collateral securities. So that if any other security is resorted to, and the

(*h*) *M'Clure v. Dunkin*, 1 East. 436.

(*k*) 2 East. 136. *Peacock's Rules and Orders of K. B.* 196.

(*i*) *Anon.* 1 Salk. 400.

(*l*) 3 Bos. and Pull. 310.

debt thereby lessened, the judgment may stand in force for the residue only; the meaning of the rule having been explained to be the same as the intent of a part of the annuity act, that it may appear upon what terms the judgment shall be entered up, and execution taken out. (*m*) In that case the warrant of attorney, judgment and execution issued, and executed thereon were all set aside. But by subsequent decisions, both in the King's Bench and Common Pleas, it has been determined that the circumstance of a defeazance not being indorsed, (*n*) or being improperly indorsed (*o*) on a warrant of attorney, is a cause of censure on the attorney who prepared it, for which the injured party may move the Court; (*p*) but is no ground for avoiding the warrant of attorney, or the judgment entered thereupon. Wherefore we may conclude that, though the exposition of the orders given in the case of *Morell v. Dubost* be correct, yet that the judgment therein will not be followed. It may be here observed, that the abovementioned orders do not apply to a case where there is only a mutual understanding between the parties as to the terms on which the judgment shall be entered up without any other security or agreement in writing. (*q*) And that a defeazance being part of a warrant of attorney, does not require an additional stamp. (*r*)

It is scarcely necessary to observe that the judgment under a warrant of attorney should be entered up as soon as possible. With respect to the cognizor and his representatives, provided it be doggetted according to the pro-

(*m*) *Morell v. Dubost* and *Another*, 3 Taunt. 235.

(*p*) 14 East. 578.

(*q*) *Barber v. Barber*, 3 Taunt.

(*n*) *Shaw v. Evans*, 14 East. 576. 465.

*Partridge v. Fraser*, 7 Taunt. 307.

(*r*) *Cawthorne v. Holben*, 1

(*o*) *Sansom v. Goode*, 2 Barn. and Ald. 568. New Rep. 279.

visions of the 4th and 5th Wm. and M. c. 20., a judgment is left as it was at common law, and is binding from the first day of the term, as of which it is entered up. (s) With respect to a *bonâ fide* purchaser for *valuable consideration*, it is binding only from the time of the judge's signing the same. (t)

The advantage of a judgment against the mortgagor is in some instances very great. A bond or covenant of itself is no lien upon lands. (u) A mortgage charges only the specific property pledged: but a judgment is a general charge on all the lands of the cognizor, which are his at the time of the entry, or at any time afterwards. (x) And in payment claims a priority to all subsequent judgments and incumbrances. (y)

On the other hand, a mortgage has advantages over a judgment; for, if the mortgagor become bankrupt, a mortgagee shall be first satisfied to the whole extent of his security, (z) he being *pro tanto* a purchaser: but creditors by bond, covenant, judgment, and simple contract, are put upon an equal footing, and are paid *pari passu*. (a) And, besides, a mortgagee may tack, which a creditor by judgment only cannot. But the best security is that which comprises both a mortgage and judgment; and so it appears to have been considered by the Court of

(s) 2 Saund. 9. n. Hickey v. S. i. no. 5. Sugden on Vend. and Hayter, 6 T. R. 384. Steel v. Pur. 380. and cases cited in note Rorke, 1 Bos. and Pull. 307. 2d (d) there, 4th edit.

Resolution in Robinson v. Tonge, (y) Bristol v. Hungerford, 2 3 Wms. 399. and the Earl of Winchester's case cited in the note there. Vern. 524. Symes v. Symonds, 1 Bro. P. C. 66. Gray v. Colvill, 2 Cha. Rep. 145.

(t) 29 Car. II. c. 3. s. 13, 14, 15. (z) Pye v. Daubuz, Dick. 759.

(u) 2 Black. Com. 340. note 14. Brander v. Bowles, Cha. Prec. 375.

(x) 2d Resolution in Brace v. S. C. 2 Eq. Ca. Abr. 112. pl. 1. Duchess of Marlborough, 2 Wms. S. C. Gilb. Eq. Rep. 35.

491. Hickford v. Machin, Winch. (a) 21 Jac. I. c. 19. s. 9.

84. 2 Bac. Abr. 339 2 Saund.

Exchequer. A man sold an estate for an annuity, but nothing was said as to the security to be given for it. Decreed that it should be secured *upon the estate*, by a bond and judgment. (b)

If the mortgagor has lands in Wales, or in a county palatine, and it is intended that a judgment shall attach upon those lands, the entry of it in any of the Courts of Westminster Hall will be sufficient; for, whatever doubts might have formerly prevailed, (c) yet it has long since been settled, that execution on a judgment in any of the Courts of Westminster Hall will run into Wales, or the counties palatine, and is now the daily practice. (d) And the legality of this practice, Serjt. Williams observes, does not depend merely upon the practice; for the jurisdiction of all the Courts in Westminster Hall, to hold plea and issue mesne process against parties resident in Wales, seems clearly to be recognized by the words of the second section of the statute 13 Geo. III. c. 51. (e)

It is of great consequence in all sales and mortgages, that the legal estate be derived to the purchaser or mortgagee in as direct a manner as possible, and that the intermediate legal owners be as few as possible; for by this means the purchaser or mortgagee will have a title free from the incumbrances of so many intermediate beneficiaries. Therefore, in all transactions of a subpurchase or assignment of mortgage, it is better to take the conveyance from the original vendor, or original mortgagee,

(b) *Remington v. Deverall*, 2 Hen. VIII. c. 26. s. 94. Anstr. 559.

(c) *Draper v. Blaney*, 2 Saund. 194. *Anon.* 1 Lev. 256. *Needham v. Bennet*, Sir T. Raym. 171. *Vaugh.* 393. The validity of a *statute or recognizance* in England over the cognizor's lands in Wales had been established by 34 & 35

(d) *Draper v. Blaney*, Sir T. Raym. 206. *Bedo v. Piper*, 2 Bulstr. 156. *Goodyer v. Ince*, 2 Brownl. 208. Serjt. Williams's note (2) to 2 Saund. 194.

(e) See his note last cited, and the words of the act.

than to have first a conveyance to the mesne purchaser or assignee, and then a conveyance from him. This remark is particularly applicable to a case of frequent occurrence. A. purchases an estate, and borrows money of B. on the security of that estate to enable him to complete the purchase. The conveyance should be made to A. and his heirs, to the use of B. for a term by way of mortgage; remainder to the use of A. in fee. This method will prevent the lands in the hands of B. from being liable to the dower of A.'s wife, or to any prior judgment against, or act of bankruptcy committed by him. (*f*)

OF AN EQUITABLE MORTGAGE, AND MORTGAGE BY DEPOSIT OF  
TITLE DEEDS.

WE proceed now to equitable mortgages, that is, a mortgage agreed to be given, and which in equity is considered as given upon a principle of equity that what is agreed to be performed shall be considered as actually performed. With respect to what shall be considered a sufficient agreement to mortgage within the statute of frauds, it may be observed that the circumstance of lending and borrowing, or the relative situation of debtor and creditor, are such leading features in such transactions, that if either of these facts can be established, few cases can occur which will not be taken out of the statute. An absolute conveyance made to a creditor simply without any express consideration will be presumed to be a mortgage, and not made to him in the character of a trustee for the grantor. (*g*) And an agreement to mortgage part of a larger estate, without specifying any particular part, will as against subsequent incumbrances with notice be

(*f*) Bradley's Prac. Points 62. Lef. 374.

(*g*) Card v. Jaffray, 2 Scho. and

held an agreement to mortgage a part sufficient for the purpose. *(h)* But an agreement to make a mortgage *when required*, without any actual demand, will not of itself give the creditor any lien on the real estate. *(i)* So an assignment of rents and profits amounts to an equitable lien; and will entitle the assignee to come into equity, and insist upon a mortgage. *(k)* So where one lent 70*l.* to the defendant's uncle, and for his security took only a warrant of attorney to confess a judgment in ejectment of three closes upon a feigned demise for twenty years. *Per Curiam.* It is a defective security, and amounts to a good agreement in equity to charge the land; and decreed it accordingly against the heir. *(l)*

But the most material point of enquiry under this head is, as to mortgages arising by deposit of title deeds.

A deposit of title deeds, with an agreement to make a mortgage, is considered as an equitable mortgage. And a mere deposit of title deeds with a creditor, or upon the advance of money without any special agreement to mortgage, or without even a word passing, is deemed such a presumption of an intention to mortgage, that the holder will be entitled to have his lien effectuated. *(m)*

This has been sometimes supposed as militating with the statute of frauds, and has in many cases been disapproved of: but it may be questioned, if the matter were

*(h)* Sir Simeon Stuart's case, Carpenter, 18th April, 1785, cited stated 3 Ves. 576. 2 Scho. and in note to 1 Bro. Cha. Ca. 270.—  
Lef. 381. Pye v. Daubuz, Dick. 759. 3 Bro.

*(i)* Williams v. Lucas, 2 Cox C. C. 595. S. C. Edge v. Worthington, 1 Cox 211. Hankey v.

*(k)* Ex parte Wills, 1 Ves. jun. Vernon, 2 Cox 12. Ex parte Wills, 1 Ves. jun. 162. Ex parte Haigh,

*(l)* Dale v. Smithwick, 2 Vern. 11 Ves. 403. 11 Ves. 401. Ex parte Mountfort, 14 Ves. 606.—

*(m)* Russell v. Russell, 1 Bro. Birch v. Ellames, 2 Anstr. 427. Cha. Ca. 269. Featherstone v. Fenwick, May 1784, and Hurford v. Plumb v. Fluitt, *ib.* 432. Richards v. Borrett, 3 Esp. 102.



*res integra*, whether equity would not be obliged to decide so at this day, upon the principle of part performance. Lord Thurlow decided the matter by asking himself, for what other purpose could the deposit have been made? (n) That a contrary decision in 1710 was not very satisfactory may be collected from the remarks of the various reporters on the case of *Brander v. Boles*. In precedents in Chancery (o) the reporter notes that no reason was given for the decree; and Chief Baron Gilbert, after making the like observation, adds *sed hoc durum à multis habebatur*. (p) Be that as it may, the validity of an equitable mortgage by deposit only is now established beyond a doubt by a numerous list of cases in which the doctrine has been both noticed and acknowledged.

The decided cases, however, are likely to limit the doctrine, for we find repeated declarations from the present Chancellor and the late Master of the Rolls of their determination not to extend it; so that the Court will, if possible, lay hold of any circumstance to take the case out of the rule. Thus, where there is a question as to the extent of the security, whether the deposit was for the debt then due, or to become due, or for the latter only, upon which fact the affidavits of the parties disagree, the Court will examine the terms, and direct an enquiry in respect of what debt it was deposited. (q) And in a case before the present Lord Chancellor, he declared that a deposit of deeds should not be considered as a mortgage except in a clear case, and refused so to treat it in that instance. But upon what the doubt arose, in the short note of it in *Vesey*, is not stated. (r) And again, a

(n) Per Lord Eldon, Ch. in *Ex parte Whitbread*, 1 Ro. Ba. Ca. 300. Ves. 606. and per Master of the Rolls in *Norris v. Wilkinson*, 12 Ves. 198.

(o) Page 375.

(p) Gilbert's Eq. Rep. 35.

(q) *Ex parte Mountfort*, 14

(r) *Ex parte Finden*, 11th Jan. 1805. 11 Ves. 404, note.

loan perfected by a legal mortgage shall not be extended by parol. The ground on which relief was sought in a case so circumstanced was, that the agreement was equivalent to a delivery of the title deeds by the mortgagee, and a redelivery, which would have constituted an equitable mortgage. (s) Nor will a mere parol agreement to deposit, without an actual deposit, confer any equitable lien. Therefore, where one, having a lease in his possession as equitable mortgagee, delivered it up to the mortgagor in order to obtain a further term, and upon a further advance it was agreed that the further term should be a security for the original debt and further advances. But no delivery was made to the mortgagee of the lease of the further term. The mortgagor becoming bankrupt, the Court held that there was a good mortgage of the original term, but that the parol agreement to deposit the further lease could give no title, and therefore dismissed the petition as to the further term. (t)

But on the contrary, in opposition to this desire of not extending the doctrine, the first cases have laid it down so broadly that in many instances it seems difficult to discover grounds for avoiding the rule. Thus, where the deposit was originally for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; as, where a creditor having such equitable lien advances a further sum on the parol agreement of the debtor, he may retain the deeds as a security for the increased debt. (u) And where a deposit had been made with some bankers, with a written agreement purporting to be a security to the house only while the partners re-

(s) *Ex parte Hooper*, 2 Ro. Ba. Ca. 328. S. C. 1 Mer. 7. Petition dismissed with liberty to file a bill.

(t) *Ex parte Coombe in re Beavan*, 4 Mad. 249.

(u) *Per Lord Eldon*, in *ex parte Kensington*, 2 Ves. & Bea. 84. *Ex parte Langston*, 17 Ves. 227. 1 Ro.

B. C. 26. S. C.

mained the same, but with a written contract arising from a bond afterwards given for securing the advances not only of that partnership but of any other. Afterwards one of the partners retired, and another was taken in: then other deposits and memorandums of their intent were made. Upon an application by the remaining partners and the one in-coming that they might be considered mortgagees of the estates, the Lord Chancellor declared, that understanding alone, unless in a fair sense amounting to an agreement, would not do; that in the principal case no two of their agreements would admit the same construction. But, if upon the affidavit and examination taken together, aided by the extreme probability of their intention, it could be collected that what was originally deposited for one purpose should be held as deposited also for the other, with reference to the demand of the subsequent partners, that though by parol it would be sufficient within the cases. (x)

A deposit of only part of the title deeds, relating only to a part of an estate, as to a moiety, coupled with evidence in writing of an intention to charge the whole, has been held a sufficient equitable mortgage of the whole. (y) Which decision turned upon the written evidence: but Eldon, Chancellor, in deciding, remarks that it had never yet been decided how far it is necessary to deliver all the title deeds; or whether that would not be taken to be a sufficient deposit which could be taken, upon looking at the instruments, to amount to evidence that the estate was meant to be a security. So that, whenever the case occurs of a deposit of only part of the deeds, though it should want the circumstance of written evidence, it should seem that it would be decided in favour of the security.

(x) *Ex parte Kensington*, 2 Ves. bankrupt, 2 Ro. Ba. Ca. 239.  
& *Bea*. 84. 2 Ro. Ba. Ca. 138. (y) *Ex parte Wetherell*, 11 Ves.  
S. C. And see *ex parte Marsh* and 398.  
*Others*, in the matter of *Carlisle*, a

Consider only that transactions of this sort are generally done without legal advice, (z) and how easy it is for the party to detain some of the deeds—and where shall the line be drawn? Suppose him to detain one of the title-deeds only. Lord Kenyon has gone so far as to say that in equity depositing all or even part of the deeds would give the party a charge upon the real estate. (a)

In two cases it has been held that a delivery of deeds to an attorney to prepare a mortgage did not constitute an equitable mortgage; and the argument in support of these decisions has been that the deeds were delivered not as a security, but only as a step towards its preparation, which was to be afterwards executed. (b) How far these cases may be held to have settled the law may be worthy of consideration, when we consider the argument of the present Lord Chancellor in delivering judgment in a still later case, where the deeds had been delivered over in order that a legal mortgage might be prepared, but with this distinction, that they were delivered over to the party himself. It is thus reported:—"The principle of equitable mortgages is that the deposit of the deeds is evidence of the agreement: but if they are deposited for the express purpose of preparing the security of a legal mortgage, is not that stronger than any implied intention?" Of course, the security in this case was holden good. (c) We find him elsewhere declaring that no case had gone the length, though he did not see the reason, that if the deposit is in the hands of a third person, who could fairly be called a third person abstracted from both, that can be considered a deposit for the creditor, provided that is proved to be the intention. (d) Now it seems that no satisfactory rea-

(z) 11 Ves. 404.

(c) Ex parte Bruce, 1 Ro. Ba.

(a) Richards v. Borrett, 3 Espi. Ca. 374.

102.

(d) See in ex parte Coming, 9

(b) Ex parte Battell, 2 Cox 243. Ves. 117. 1 Ro. Ba. Ca. 301.

Norris v. Wilkinson, 12 Ves. 192.

son can be assigned why a deposit with a third person, as a pledge and a delivery to a third person to prepare a legal security, should be determined differently, while the same acts with the party himself will meet with the same construction. But little doubt can remain of what would have been the determination of the late Master of the Rolls in *Norris v. Wilkinson*, had the case *ex parte Bruce* occurred before it. His judgment therein is made to depend expressly on the want of a case in which the effect of a deposit had been given to a delivery of deeds made for the mere purpose of having a mortgage drawn. (*e*)

The wife of the debtor is not so abstractedly a third person as that a deposit with her will create a security. (*f*) Nor shall a deposit made with one person who *advances* money be extended to be a security in favour of a second person who also advances money on an agreement that the first person shall hold as a security for him also. (*g*) Nor shall a transfer of deeds from a depositary, in whose possession they constituted an equitable mortgage, to a person who discharges his debt, be held to be such an assignment from him as to overreach a prior act of bankruptcy committed by the original depositor, against the express words of a defeazance on a warrant of attorney from the bankrupt to the transferee stating that the deeds had been deposited by himself. (*h*)

A deposit of copies of court rolls of copyholds is a deposit of deeds so as to constitute an equitable mortgage. (*i*)

And where a lease contains a covenant against assigning, without the lessor's licence, it may nevertheless be

(*e*) 12 Ves. 200.

N. B. This case is best reported in

(*f*) *Ex parte Coming*, 9 Ves. 115.

*Rose*, where it is stated that the petition was dismissed without pre-

(*g*) *Ex parte Whitbread & Others*, 1 Ro. Ba. Ca. 299.

judice to a bill.

(*i*) *Ex parte Warner*, 1 Ro. Ba.

(*h*) *Ex parte Coombe*, 17 Ves.

Ca. 286.

369. S. C. 1 Ro. Ba. Ca. 268.

equitably mortgaged by deposit previously to the licence being obtained. (*k*)

It remains only to observe, that it would be a most desirable caution if those who wish to render securities by deposit valid, with whomsoever made, would only require a short memorandum in writing of the intention. (*l*) A satisfaction which might be contained in two lines, and which no person willing to part with his deeds would refuse. (*m*) In the case of bankers, with whom papers are continually left, it might be particularly useful; for the casual deposit of a lease with bankers, without any declaration of the intention, will not, as in the case of paper-securities, give them any lien thereon for the general balance. (*n*)

As a mortgage may be created by deposit, so may a mortgage be assigned or submortgaged by deposit. (*o*)

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#### OF A MORTGAGE OF SHIPS.

A MORTGAGE of a ship is like the mortgage of any other chattel, and subject to all the principles laid down in courts of law and equity relative to such mortgages. And an equitable interest in ships may be mortgaged as well as the legal. But then, upon every transfer of interest, whether legal or equitable, as well as upon every contract relating to those interests, the requisites of the registry acts must be observed. (*p*) Thus, a deposit of the documents relating to a vessel will not confer even an

(*k*) *Ex parte Baglehole*, 1 Ro. 278. S. C. 1 Moore 29. Ba. Ca. 432.

(*o*) *Matthews v. Wallwyn*, 4

(*l*) 1 Ro. Ba. Ca. 301.

Ves. 118.

(*m*) 12 Ves. 197.

(*p*) See *Thompson v. Smith*, 1

(*n*) *Lucas v. Dorrien*, 7 Taunt. Madd. 395.

equitable lien ; (q) though, as to liens arising by the course of trade, the case stands upon a different ground. (r)

The practice which has sometimes obtained, of making mortgages of ships by two instruments, one an absolute conveyance and the other a deed of defeazance, is incorrect. It arose from the difficulty raised at the Custom House in departing from the prescribed form of entry, which is that of an absolute transfer. (s) But the error was no sooner stated than the means for avoiding it provided. The manner of making mortgages of ships, and the steps necessary to be taken by the mortgagee to effectuate his security, have been most clearly laid down by the present Vice-Chancellor in the case of *Thompson v. Smith*, (t) in the following words :—“ The mortgage” must “ be made by the usual bill of sale of the ship, containing in the same instrument a defeazance or condition of re-transfer, on payment of the mortgage money. This bill of sale must contain the recital of the certificate, as the act directs ; and must be fully indorsed on the certificate of registry if the ship be in port ; or, if at sea, a full copy of it must be transmitted to the Custom House. The form of indorsement will be the one prescribed by the act ; but with the addition of the defeazance to express the true nature of the contract between the parties, whenever it becomes material to resort to evidence of it. There is nothing in the act to prevent such an addition being made to meet the exigency of the case. A greater deviation from the form prescribed by the act was sanctioned by the Court of Common Pleas in the case of a partial transfer of the interest in a ship ; (u) and an ingenious living writer (x) has well observed, that the act seems to require

(q) *Taylor v. Kinloch*, 1 Stark. (r) 1 Madd. 395.

175. (u) *Underwood v. Miller*, 1

(r) *Mestaer v. Atkins*, 5 Taunt. Taunt. 387.

381. (x) *Abbott*, on Shipping, 44.

(s) 34 Geo. 3. c. 68. s. 15.

a similar deviation in the case of a mere contract for the sale of a ship which the act directs to be registered, but which cannot be in the exact words of the form prescribed. A liberal interpretation of the act must be adopted to make form give way to substance. In the subsequent forms to be observed at the Custom House the defeazance will probably not be noticed, either in the entry indorsed, or the oath, or in the memorandum made in the book of registers: but, adhering simply to the form prescribed by the act, it will be registered as an absolute bill of sale. But neither the mortgagor nor mortgagee can suffer by that omission. The statutes invalidate the transfers only in the event of a neglect of the prescribed requisites by the parties, not for any mistake or neglect by the public officers. And in the event of any dispute of the title in a court of justice, the proper evidence of title will be the original documents themselves, not any imperfect abstract made of them at the Custom House. By that abstract the mortgagee will, it is true, appear the sole and absolute owner; and so he is, *pro tempore*, till redemption. But the mortgagor's right to call for a retransfer will appear from the bill of sale, fully indorsed on the certificate if the ship be in port; or, if at sea, by a full copy transmitted to the Custom House: and I see no ground on which that right can be resisted. It is a mistake to suppose that the owner of a ship cannot make any transfer of property without passing entirely and irredeemably with all his interest." (y)

And the Court of Chancery will upon the mortgage of a ship at sea, provided the forms of the statutes have been observed, grant an injunction to prevent the mort-

(y) *Thompson v. Smith*, 1 Mad. Term Rep. 462. *Bloxam v. Hubbard*, 5 East. 407. *Wilson v. Hea-*  
*3 Term Rep. 406. S. C. 3 Bro. Cha. ther*, 5 Taunt. 642.  
*Ca. 571. Atkinson v. Maling*, 2



gagor from taking out of the hands of the Master the certificate of the registry. (z) But if the mortgagee is prevented from complying with the forms of the statutes, though by the fraud of the mortgagor, there is no ground for relief, even in equity. (a)

It will occur to the reader, that in consequence of the registry acts requiring the assignment of ships to be evidenced by bill of sale in writing, that mortgages of ships may be more particularly resembled to mortgages of leaseholds; and that, if it be intended to bind the real assets, they must be bound by bond, covenant, judgment, or some other method besides the assignment.

The great distinction that there is between real estates and chattels personal is this, that the latter is held by possession, a real estate by title. And there is the highest necessity for this distinction, for the common traffic of the world could not go on without it. A sale in market overt changes the property of a chattel personal, and the rule that possession is the criterion of title to a chattel has been adopted by the bankrupt acts: (b) so that if the owner has permitted the bankrupt to be the visible proprietor, the property is divested, for no one can distinguish the property except by the possession. (c) Wherefore, in all mortgages of chattels personal in possession, the mortgagee should insist on having the possession delivered over to him. But where, from the circumstance of the case, actual delivery cannot be made, the law will be satisfied by every thing being done towards delivery which the nature of the thing admits. (d)

(z) *Thompson v. Smith*, *ubi sup.*

(c) 13 Ves. 119, 122.

(a) *Ex parte Balteel*, 2 Cox. 243.

(d) As to the effect of possession on mortgages of chattels personal, and what shall be considered

*Bland v. Graves*, 23 April, 1808.

*Barker v. Chapman*, 3 March, 1812.

stated in note 1 *Mad.* 399, 400.

a sufficient taking possession, see *post.*

(b) 21 Jac. 1. c. 19.

## CHAPTER II.

OF MORTGAGES UNDER POWERS, BY TENANTS IN TAIL, AND TRUSTEES;—AND OF MORTGAGES TO TRUSTEES.

**WE** come now to treat of mortgages of particular interests, or where one of the parties acts in a particular capacity.

This head of enquiry may be assisted by the following division:—1. Mortgages under powers. 2. Mortgages by tenants in tail. 3. Mortgages by trustees. And, 4. Mortgages to trustees.

## SECTION I.

## MORTGAGES UNDER POWERS.

A PERSON, having a power of appointment generally, may make a mortgage under that power. But if the mortgage be in fee, it will operate as a total execution of the power at law. (*a*) Not so in equity, for there it will be considered but a partial execution. (*b*) This doctrine of equity, however, is confined to the case of a simple mortgage; for if, subject to the mortgage, there be an ulterior disposition over of the lands inconsistent with the former

(*a*) Sugd. on Pow. 271, 272, 273. Cha. Ca. 69.  
 And see *Roberts v. Dixall*, 2 Eq. Ca. Ab. 668. pl. 19. 6 Ves. 797. (*b*) *Thorne v. Thorne*, 1 Vern. 141. 182. *Lassels v. Cornwallis*,  
*Thwaytes v. Dye*, 2 Vern. 80. 3 Cha. Prec. 232.

estate of the mortgagor, the mortgage will even in equity be held to be a total execution of the power. (c) But a mortgage to the person entitled to the estate, subject to the power, will not vary the case so as to deprive that person of the benefit of the former limitation in his favour; (d) in the same manner that a mortgage to the devisee is not a revocation of the devise. (e) The foundation and reasoning upon which the Court goes being in either case the same. (f)

A power to charge an estate with a particular sum of money, will not enable the donee to appoint the estate to a mortgagee in fee. Thus where a tenant for life, having a power to charge the land with 2000*l.* joined with the remainderman in tail, without referring to the power in conveying the inheritance to a mortgagee for securing 2000*l.*, it was determined at law, that the power was not executed. Hale, C. B. observing, that the power might have been well executed by a grant of the land until 2000*l.* was raised by the profits, (g) or by a declaration of use until 2000*l.* was received, or by a deed charging the land with the sum: but he doubted whether a feoffment or release of the inheritance was within the power. Yet said that there might be relief in equity. (h) Afterwards the matter coming on in Chancery, Lord Keeper Bridgman, assisted by the Master of the Rolls, held that the tenant in tail having joined with the tenant for life in the conveyance, and covenanted on default of payment for further assurance, and not reciting the power, it could not be taken to be a conveyance in execution of the power, but as owner. (i) From this, how-

(c) *Fitzgerald v. Fauconberge*,  
Fitzg. 216, 217.

(d) *Thorne v. Thorne*, 1 Vern. 182.

(e) *Peach v. Phillips*, 2 Dick.  
538. *Baxter v. Dyer*, 5 Ves. 656.

(f) *Fitzgib*, 216.

(g) See *Sheldon v. Dormer*, 2  
Vern. 310. Raithby's edition, where  
this method was pursued.

(h) *Jenkins v. Keymis*, 1 Lev.  
150. Hard. 395.

(i) *Jenkins v. Keymis*, 1 Lev.

ever, it will appear that where an inference can be drawn that it was the intention of the parties to execute the power, the subject will be a proper case for equitable relief. (j) In practice, it is always considered that a man having a mere power to charge, cannot mortgage; but that the most he can do is to charge the lands with the money, which confers but an equitable security, and cannot be got at without the assistance of the Court; wherefore it is usual in all deeds giving a power to charge, to superadd a power to raise a term of years for the purpose of securing the money.

But a power to charge always implies a power to charge with interest; for the intention in such case is to charge with the principal money, and that of course carries interest; and nobody would lend money on such security if the law were otherwise. (k) The rate of interest is in the breast of the party charging; he may fix it at 5 *per cent.* or any other legal rate of interest. (l) If he neglects to fix the interest, the interest allowed by the Court of Chancery is 4 *per cent.*: but if he does fix the rate, it cannot be controuled, diminished, or increased. (m) And the rule with respect to the interest, is the same whether the estate to be charged be an estate in possession, or in remainder; for the party complaining, or the subsequent owner, can always discharge himself by procuring the money at a lesser rate of interest, or paying off the principal. (n)

A power to *charge* with a particular sum will not, as

237. 1 Cha. Ca. 103. 1 Lev. 152.  
in marg. 1 Cha. Rep. 145.

(j) Fothergill v. Fothergill, 2  
Freem. 257.

(k) Kilmary v. Geery, 2 Salk.  
538. 1 Eq. Ca. Abr. 341. pl. 4.  
2 P. Wms. 671. Hall v. Carter,  
2 Atk. 358. Boycot v. Cotton, 1

Atk. 552. Evelyn v. Evelyn, 2  
P. Wms. 659.

(l) Boycot v. Cotton, 1 Atk. 552.

(m) Lewis v. Freke, 2 Ves. jun.

507.

(n) See the cases cited in the  
two last notes.

we have seen, authorize a mortgage ; but a power generally to *raise* a sum of money will : for where a testator, after giving his estate to A. in tail, remainder to B. in tail, remainder to C. in fee, gave to his executor full power and authority to raise out of his estate 500*l.* for the use of his next heir, it was held, that the executor had sufficient power to *sell* the lands. (*o*) And a power to sell for a particular purpose implies a power to mortgage, which is a conditional sale. (*p*)

Where a sum was charged upon an estate for the benefit of children, “in such manner” as the survivor of husband and wife should appoint, it was held, that the words not only included a power of raising it by mortgage or sale, but a certain determinate time for raising it. (*q*)

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## SECTION II.

### MORTGAGES BY TENANTS IN TAIL.

SOME doubt seems to prevail in the books as to the precise situation of a tenant in tail, who has mortgaged without first acquiring the fee. In one case Mr. Justice Wright observed, that he did not apprehend the Court would point out what title the tenant in tail should make, but would decree him to make such title to the mortgagee as he was capable of doing. And, therefore, he directed a good title to be made, and the principal, interest and costs, on the mortgage to be paid in six months, or the

(*o*) *Wareham v. Brown*, 2 Vern. 9. 1 Ves. 42.

153. *Bateman v. Bateman*, 1 Atk. 421. (*q*) *Green v. Belchier*, 1 Atk. 507.

(*p*) *Mills v. Banks*, 3 P. Wms.

tenant in tail to be absolutely foreclosed. (*r*) But it seems that if the bill prayed it, the Court would decree a fine or recovery. (*s*) More especially, if there were in the mortgage a covenant for further assurance. (*t*) Though such decree would not be binding on the issue in tail in case of the mortgagor's dying without levying the fine, or suffering the recovery, even if he should stand out all process against him to a contempt. (*u*)

Where tenant in tail had mortgaged, but without a covenant for further assurance, and afterwards became bankrupt and died, it was held that the mortgage was good against the tenant in tail only during his life, and that the assignees were not afterwards bound to make it good. (*x*) The propriety of which decision, as it has been acted upon, (*y*) may be thought too well established to be now questioned. But if the mortgage deed contain a covenant for further assurance, the estate in the hands of the assignees, discharged of the intail by the operation of the statute, (*z*) has been held liable to the mortgage; and the assignees have been accordingly directed to convey it to the mortgagee. (*a*)

If a tenant in tail mortgage, and afterwards levy a fine, or (the mortgage being for years) suffer a recovery; the fine or recovery will operate so as to let in the mortgage, and confirm it against all persons claiming under such

(*r*) Sutton v. Stone, 2 Atk. 101.

(*s*) Case cited in Powell v. Powell, Cha. Prec. 278. Hill v. Carr, 1 Cha. Ca. 294. 1st Decree.

(*t*) Jenkins v. Keymis, 1 Lev. 237. *Ib.* 152. in marg. Weale v. Lower, cited 2 Vern. 306. 1 P. Wms. 720. Tourle v. Rand. 2 Bro. C. C. 652.

(*u*) Powell v. Powell, Cha. Prec. 278. Herbert v. Tream, 2 Eq. Ca.

Ab. 28. Sangon v. Williams, cited Gilb. Eq. Rep. 164. And see the cases cited in the last note.

(*x*) Beck v. Welsh, 1 Wils. 276.

(*y*) So stated by Mr. Lloyd, 3 Bro. C. C. 598.

(*z*) 21 Jac. I. c. 19. s. 12.

(*a*) Edwards v. Applebee, 2 Bro. 652. *n.* Pye v. Daubuz, 3 Bro. 595. And see Tourle v. Rand, 2 Bro. 650.

fine (*b*) or recovery, (*c*) as well as against the issue in tail. And this operation will not be controuled by the particular design for which those assurances were had. (*d*) Unless, indeed, they be had under a decree of the Court, in which case equity will not suffer them to operate further than the decree intended. (*e*)

Or if tenant in tail having the reversion in fee mortgage, and his heir after his decease levy a fine, such fine will let in the reversion into possession, and thereby give to the mortgagee an immediate right of entering and holding against the heir, for in such case a fine extinguishes the estate tail; (*f*) which is different from the case of a recovery suffered by the heir in tail, because a recovery neither extinguishes an estate tail, nor brings the reversion into possession, but enlarges the estate tail into a fee simple, and so absolutely destroys all reversions or remainders expectant thereupon. (*g*)

But if the mortgage by the ancestor be in fee, the issue in tail cannot suffer a recovery without making a previous entry on the lands; for the conveyance of the ancestor tenant in tail by lease and release, or bargain and sale, passes a base fee; not determined nor determinable till the entry of the issue. (*h*)

(*b*) 2 Rol. Abr. 473. adjudged between Jon. and Bull. Holbeach v. Sambeach, Winch. 102. S. C. Cro. Car. 103. 1 Cha. Ca. 49. 1st Resolution. 4 Mod. 6. Pig. Recovery. 121.

(*c*) 1 Rep. 62. a. 62. b. 2 Rep. 52. b. Goddard v. Complin, 1 Cha. Ca. 119. Beck v. Walsh, 1 Wils. 277. Goodright v. Mead, 3 Burr. 1703. 5 Term Rep. 110. n.

(*d*) Goddard v. Complin, 1 Cha. Ca. 119. Fleetwood v. Templeman, 2 Atk. 79. S. C. Barnard. Cha.

Rep. 187. And see cases in the two last notes, and 1st Resolution in Goodrick v. Brown, 1 Cha. Ca. 49.

(*e*) Goodrick v. Brown, 1 Cha. Ca. 49. 1st Resol.

(*f*) Symonds v. Cudmore, 4 Mod. 1. Shelburne v. Biddulph, 6 Bro. P. C. 356.

(*g*) 5 Cru. Dig. 487. 1st edit. Bradley's Prac. Points 76.

(*h*) Machil v. Clark, 2 Salk. 619. Rep. temp. Holt 615. When the whole legal fee-simple is vested in

## SECTION III.

## MORTGAGES BY TRUSTEES.

THE most obvious points of enquiry in considering mortgages by trustees seem to be, 1. Where mortgages are authorized by trustees. 2. The time at which trustees may mortgage, in which we shall have to consider the doctrine of the raising and vesting of portions, maintenance money, and interest. 3. The construction put upon certain powers to raise money, and the mode of exercising a trust or power to raise. And, 4. When a trust or power to raise money shall be held to be satisfied, and the effect which a mortgage shall have upon a power which authorizes a mortgage or sale.

All these may be controuled by the express words of the parties, in which case the trustee is bound implicitly to follow his trust, for a declaration of trust is like the prescribing a law to the trustee, which must be observed by him, and contains in it a prohibition to act to the contrary. (*i*)

## WHERE MORTGAGES ARE AUTHORIZED BY TRUSTEES.

By a numerous list of cases, it is settled that where lands are vested in trustees for the purpose of raising

trustees, and the equitable fee is limited to one in tail, with equitable remainders over, and the tenant in tail mortgages without barring the remainders, whether the concurrence of the mortgagee is ne-

cessary in order to enable him to make a tenant to the præcipe to suffer an equitable recovery, see Mr. Butler's note to Fearn's Cont. Rem. 61.

(*i*) 1 P. Wms. 455.



money for the payment of debts, legacies, or portions out of the rents and profits that the trustees may raise it by sale; (j) and in every such case, a trust or power to sell implies a power to mortgage. (k) The natural meaning of the word profits, it is true, is confined to annual profits: but, in its more extended signification, it may apply to any profits which the land may be made to yield, whether by sale or mortgage; and, therefore, in these cases the expression shall give way to convenience and intention. The first consideration is the intent to provide a fund for payment; the second to put that intent into effect.

But the construction thus put upon the words "rents and profits," may be negatived either by the express words of the parties, or by the affixing of other words explanatory of their sense of the meaning. Thus where there is a direction to raise out of *annual* or *yearly* profits, the trust will be confined to the annual profits as they accrue. (l) So if the trust be to enter and receive the rents until a certain sum shall be raised and received, it will confine it to a raising by the annual profits only. (m) In like manner if it be for payment, as the profits shall advance the money. (n) So where the trust is for payment out of rents and profits, or by leasing, or by granting copyholds on fines, there the expressing a particular mode does in fact imply a negative to the money being raised in any other way, it restrains it to a payment out

(j) *Backhouse v. Middleton*, 1 Cha. Ca. 176. *Lingon v. Foley*, 2 Cha. Ca. 205. *Warburton v. Warburton*, 2 Vern. 420. *Trafford v. Ashton*, 1 P. Wms. 415. S. C. 10 Mod. 401. *Talbot v. Duke of Shrewsbury*, Cha. Prec. 395, 396. S. C. Gilb. 90. *Green v. Belchier*, 1 Atk. 505. Anon. 1 Vern. 104. 2 Ves. jun. 481. *n.* And cases there cited.

(k) 3 P. Wms. 9. 1 Ves. 42.

(l) *Trafford v. Ashton*, 1 P. Wms. 415. S. C. 10 Mod. 401.

(m) *Green v. Belchier*, 1 Atk. 505. *Sheldon v. Dormer*, 2 Vern. 310.

(n) *Baines v. Dixon*, 1 Ves. 41.

of the rents and excludes a power of sale or mortgage. (*o*)

But a devise to pay debts out of rents, and *then* to convey the lands, will not hinder a sale, and limit it to annual profits. (*p*) And, under circumstances, a sale has been decreed, though the trust were for payment out of *annual* rents and profits. (*q*)

So if the estate be otherwise charged, even a direction that the money shall be raised out of annual rents will not prevent the Court from decreeing a sale. As where a father having power to charge with 5000*l.* for daughter's portions; by *deed* reciting, his power charged the premises with 5000*l.* for his daughter's portion, payable at eighteen, or marriage; and for the more effectual raising thereof, appointed that certain trustees should have the possession immediately from and after his decease, until they should by rents and profits raise and receive the 5000*l.* And by Lord Somers.—In this case it is agreed that if the father had only said that, pursuant to his power, he charged the premises with 5000*l.* without going further that the Court might have decreed a sale. Now in the first part of his deed he does execute his power, and expressly declares the estate shall stand charged: then he proceeds, and says, that for the more effectual raising of the 5000*l.*, the trustees shall enter and hold until the money be raised by rents and profits. It would be an unnatural construction to say that he meant by this to restrain what he had before done. What he says for the

(*o*) *Ivy v. Gilbert*, 2 P.Wms. 13. S. C. Cha. Prec. 583. and 2 Bro. Par. Ca. 468. *Evelyn v. Evelyn*, 2 P.Wms. 659. *Cooke v. Parsons*, Cha. Prec. 184. S. C. 2 Eq. Ca. Abr. 371. pl. 12. *Ridout v. Earl of Plymouth*, 2 Atk. 103. And see *Ld. Macclesfield's judgment in Mills*

*v. Banks*, 3 P. Wms. 1. *Gibson v. Rogers*, Amb. 95. *Small v. Wing*, 3 Bro. Par. Ca. 503.

(*p*) 1 Ves. 41.

(*q*) *Rawlins v. Brotherson*, cited 1 Bro. Cha. Ca. 312. 2 Ves. jun. 480, 481.

more effectual raising you would construe to hinder and restrain the raising of it : but the truer construction of the clause is, that no part of the profits should be divested or otherwise applied until the 5000*l.* were raised ; and the remainder men in trust contend for nothing, since the estate can never answer the charge laid thereon ; and therefore decreed a sale, and all parties to join. (*r*)

Where, by fine and recovery, lands were limited in strict settlement, with a condition that if the settlor at his death should leave one only daughter, and no son, then if the person in remainder should not pay to such daughter 2000*l.* at one payment after she was sixteen, the recoverors should stand seized to the intent that it might be lawful for such daughter, so long and until she should receive the 2000*l.* to enter and distrain for the same, and the distress to impound and keep till the 2000*l.* and damages were satisfied. The Lord Chancellor Jefferies declared, that though there was no manner of proof to that purpose, that he would take it, that it was intended that in case the remainder man failed of payment at the day, the trustees were to sell to raise it. And the decree ordered that it should be referred to the Master to compute what was due ; and that in order to the raising what was so due, and damages, the surviving trustee should make and execute such leases, mortgages, &c. as were necessary. (*s*)

#### THE TIME AT WHICH TRUSTEES MAY MORTGAGE.

Where the trust is to raise money for portions in order to ascertain at what time trustees may mortgage, the two most material considerations are, 1. Whether the portions

(*r*) *Sheldon v. Dormer*, 2 Vern. 1. Decree stated in Raithby's 310. *Green v. Belchier*, 1 Atk. 505. edition.

(*s*) *Meynell v. Massey*, 2 Vern.

are vested; and, secondly, whether there are any words to postpone the raising to a period subsequent to their becoming vested. And these naturally resolve themselves into questions of intention.

As to the first of these questions which has frequently occurred of late, there is no great difficulty in collecting the law upon it. If the settlement clearly and unequivocally points out the period at which, or the contingency upon which the right of a child to a provision shall depend, a court of equity has no authority to controul that disposition. “But if the settlement is incorrectly or ambiguously expressed, if it contain conflicting and contradictory clauses, so as to leave, in a degree, uncertain the period at which, or the contingency upon which, the shares are to vest, the court leans strongly towards the construction which gives a vested interest to the child when that child stands in need of a provision; usually as to sons at the age of twenty-one, and as to daughters at that age or marriage.” (s) By Sir Wm. Grant, late master of the Rolls.

The case of *Wingrave v. Palgrave* (t) was a case of the first description; and it was impossible for ingenuity to raise a doubt upon it; for, first, the estate tail preceded the term for raising portions; and the eldest son, upon attaining twenty-one, might have barred all the portions; and the trust of the term was declared that if the tenant for life should die without heir male, and leaving a daughter or daughters, upon which there could be no ambiguity; for the settlement went on to say that if he should not have a daughter living at his decease, the term should cease. There was only one daughter who died in her father's lifetime, leaving issue; so that the term being gone

(s) *Howgrave v. Cartier*, 3 Ves. & Bea. 85, 86. *Granville*, 2 Vesey 332. *Gordon v. Raynes*, 3 P. Wms. 134. *Hick-*

(t) 1 P. Wms. 401. 9 Ves. 436. *man v. Anderson*, 2 Vern. 655.  
3 Ves. and Bea. 86. *Worsley v.*

at law it was impossible to contend that it should be revived in equity, and the portion raised.

The other cases are of the second description. And herein it has been decided that where portions are directed to be paid to children, sons at twenty-one, and daughters at twenty-one, or marriage, with a clause directing survivorship between the children, in case any of them should die before their shares become "due and payable," which, by the words of the trust, could not be till after the decease of their parents, that the words "due and payable" in the latter clause must relate to the times before fixed, twenty-one or marriage; and that they cannot controul the former declaration under which the children's shares would become vested at those times, so as to carry over the share of a deceased child to the survivors. (x) For the meaning of such words has been rightly explained by Sir Wm. Grant, in a settlement of personalty, where the trustees were to stand possessed, after the deaths of the parents, for the children equally, to be paid to the sons at twenty-one, and to the daughters at twenty-one, or marriage; with a clause postponing payment in case of either of those times happening in the lives of their parents, till their decease; and a further clause directing the children's shares to go over to the survivors in case of any of them dying before their shares should become payable, &c. His Honour was pleased to declare, that the words "payable, assignable, or transferable," have different senses, according to the different clauses of the settlement to which they refer. With reference to the right or capacity of the children, the sense is, at twenty-one, or marriage: but then the enjoyment of the persons entitled for life is not to be broken in upon. It is, therefore, provided that the right which ex-

(x) *Emperor v. Rolfe*, 1 Ves. Bro. 253. n. *Willis v. Willis*, 3 208. *Cholmondeley v. Meyrick*, 3 Ves. 51.

ists for every other purpose shall not be exercised to their detriment. With reference to that interest the sense is, not till the death of the tenant for life. But it is only with reference to that that the preceding declaration is at all qualified; and as against every one but the tenant for life, the children have a right to say it remains unqualified. (*y*)

And even as against the tenant for life it remains unqualified, except so far as it relates to the time for the raising and payment. For where the payment was to be at twenty-one, happening after the decease of the survivor of the parents, upon a question between the representative of an only child, who had attained twenty-one, and the mother, it was determined that the son's executor was entitled. (*z*)

Where a direction to raise money for portions has been preceded by a declaration that if the parents should *leave*, at the death of the *survivor*, any child or children of their two bodies; (*a*) or, "in case there shall be any child or children of A. on the body of B. *living* at the time of the decease of the said A.," (*b*) then that the trustees should raise, in each of which cases it has been holden as against a surviving child, that the share of a deceased daughter vested in her, so as to be transmissible to her personal representative, though the express contingency of her surviving her parents or parent, did not take place. In these cases we are to observe that the events upon which the portions were to become raisable actually did happen; for a child survived the parents.

(*y*) *Shenck v. Legh*, 9 Ves. 310. 83. *n.* *King v. Hake*, 9 Ves. 438.

(*z*) *Jeffreys v. Reynous*, 6 Bro. Powis *v. Burdett*, 9 Ves. 428.  
P. C. 260. Stated 9 Ves. 311.

(*a*) *Woodcock v. Duke of Dor-* 499.  
*set*, 3 Bro. C. C. 569. 3 Ves. & B.  
(*b*) *Hope v. Lord Clifden*, 6 Ves.

And upon this ground stands the case of *Randall v. Metcalf*, (c) where, after a provision for a daughter and her children, the money was given over, if the daughter should die "without leaving issue." She had a son and daughter: the daughter died in the lifetime of her mother, but the son survived; so that the contingency of her dying without issue did not happen;—and it was decided that the representative of the deceased child was entitled to her share as against the son.

So in *Heurtley v. Mason*, (d) where money was settled after marriage upon the husband and wife for life, remainder to the children at twenty-one, with a trust for the wife absolutely, if the husband should die and the wife survive (which was the case), *he leaving no issue of her body begotten, or that such issue should die in the lifetime of the said wife*, there was issue of the marriage one daughter only, who died in the lifetime of her mother, leaving two children. And upon a question between the grandchildren and the executors of the mother, it was held by Lord Chancellor Northington that the words "leaving no issue," in the last clause, are to be construed "leaving no posterity." The word issue is *nomen collectivum*; and does not, in that part of the settlement, mean children, as it does in some parts of it. That as the daughter attained twenty-one, and left issue, though she died in her mother's lifetime, the last clause did not take place, but was an interest vested in the daughter, and transmissible to her representatives.

But in cases where a testator has left money to a daughter for life, and afterwards to her children at twenty-one, with a bequest over, if the daughter should die without *any child or children living at the time of her decease, or being such in case all such children should die before*

(c) 6 Bro. P. C. 559. S. C. 9 Smith, 14 Ves. 470.  
Ves. 314. See also *Bayard v.* (d) Amb. 621.

*their portions should become payable*; it has been held that the portions of the *grand-children* were contingent, depending upon the event of their surviving their mother. (e)

But in the case of *Powis v. Burdett*, (f) where by marriage settlement it was declared that after the decease of the Earl of Denbigh, in case he shall leave one or more daughter or daughters, younger son or younger sons of his body, on the body of his intended wife to be begotten, then that the trustees should raise money for the portions of such children. And in which case the condition of surviving the parent was not at all fulfilled; for no child outlived the settlor. The Chancellor was reduced to the necessity of overcoming the difficulty arising from the word "leaving;" and this he did by laying hold of a clause for advancement, inserted in the settlement. For the father could not make an advancement for any child, if no child could take except a child surviving.

This has been thought a strong case: but it is no more than agreeable to an obiter opinion of Lord Eldon's elsewhere expressed. In *Hope v. Lord Clifden* we find him noticing that it had been said that if there was no younger child at the death of the father, none of the younger children could have had their portions; and declaring that that he did not conceive that. That it might have been as well argued in *Woodcock v. Duke of Dorset*; in which case it was clear that in that event Lord Thurlow must have held that they would have had it; and, in fact, had held that if they married or attained twenty-one, though they died in the lifetime of both parents, they would have been entitled. That there was not a word in the context to sustain that opinion in that case. That there was con-

(e) *Bennett v. Seymour*, Amb. 521. (f) 9 Ves. 428.  
Lloyd v. Bird, 9 Ves. 305.



siderable context to support it in the principal case. The legal term existing, if it could be said to exist at law, though *all* died in the life of the father, they should take. (g)

Where a parent has a power to settle the shares which the several children shall take by will; and, in default of appointment, the fund is given over to the children; such power will not prevent the children from taking vested interests in their portions, immediately upon their respective births, subject to be divested by the exercise of the power. (h) The law was once held otherwise. (i) And in *Willis v. Willis*, (k) where there was a power of appointment by will, the difficulty arising from that circumstance was allowed. But the case, in default of appointment, having happened, the Court said they were glad the case had not arisen in which that argument could be pressed; and, therefore, decided it on another ground. Nor will an appointment amongst younger child, declaring the meaning to be *such* as do not inherit the estate where there is a previous life interest subsisting, postpone the vesting till the decease of the tenant for life, in order to know who such younger children shall be. (l) But a power to appoint the share by will will postpone the raising of the portions till after the parent's decease, as we shall presently see.

Having ascertained when portions are vested, the presumption is, that they are then payable; and, if vested and payable, it follows as a matter of course that they should be raised as soon afterwards as may be; for from that time they will carry interest; and the land will be charged with interest, though the fund provided for payment be a re-

(g) 6 Ves. 510.

rough, 3 Bro. C. C. 254.

(h) *Vanderzee v. Aclom*, 4 Ves.

(k) 6 Ves. 508. 3 Ves. 51.

787.

(l) *Conway v. Conway*, 3 Bro.(i) *Boyle v. Bishop of Peterbo-*

C. C. 267.

versionary interest; therefore the next enquiry is rather in the negative.—What shall postpone the raising to a period subsequent to the vesting?

In a case before Lord Eldon, in which the question was very fully considered, after noticing the various rules of construction laid down by previous chancellors, (which shews at once the indecision and the fluctuation of opinion, which, for a long time, prevailed upon the subject,) his lordship proceeds to observe, that the rule upon the whole depends upon this; whether it was the intention of the parties to the instrument attending to the whole of it, that the portion should or should not be raised in this manner; taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of twenty-one, or marriage; if there is nothing more, and the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest is payable, and the portions must be raised in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term. (*n*) And if a reversionary term shall be mortgaged or sold, *à fortiori*, may a term or interest in possession.

If a trust be limited to arise upon failure of issue male, (*o*) or upon the father's *dying* without issue male, (*p*) or if the trust of a term be declared that if the father die without issue male of his body, (*q*) or if there be no issue male of a marriage, (*r*) then the trustees to raise portions for daugh-

(*n*) *Codrington v. Lord Foley*, 6 Ves. 380. *Stanley v. Stanley*, 1 Atk. 549.

(*o*) *Staniforth v. Staniforth*, 2 Vern. 460. *Sandys v. Sandys*, 1 P. Wms. 707. *Heliar v. Jones*, 1 Eq. Ca. Ab. 337, pl. 2.

(*p*) *Gerrard v. Gerrard*, 2 Vern. 458.

(*q*) *Greaves v. Mattison*, 2 Jon. 201. *Smith v. Evans*, Amb. 633.

(*r*) *Hebblethwaite v. Cartwright*, For. 30.

ters; and the mother, from whom the issue male were to spring, die, without male issue in the father's lifetime, the daughters' portions will become raisable immediately upon the death of the mother; for all that was contingent has happened. It is become impossible that there should be issue male; and as to the father's death, that is not contingent, for all men must die. And this construction will not be varied in cases where the term is made to cease on the father's advancing the daughters' portions in his lifetime; (s) or where the settlement provides maintenance. (t) Nor will the trustees be allowed to wait till the parent's decease, in order to make their election in what way the money shall be raised, where the trust has given them an option of doing it out of the rents and profits, or by mortgage or sale. (u) And in such cases it is no more in the discretion of the Court to postpone the raising than in the power of the trustees. (x) In the same manner the giving the child a power of entry, to secure a portion, will not postpone the raising till the reversion falls into possession. (y) And against this rule of raising out of a reversionary interest, any argument drawn from the child's being already provided for by another relation, or by the kindness of the one providing, will be of no avail. (z)

In these cases the portions were held to be raisable in the parent's lifetime, because the trust to raise only depended on a contingency; and, by the decease of one pa-

(s) See the case cited in the last note, and 2 P. Wms. 101.

(t) Greaves v. Mattison, 2 Jon. 201. Hebblethwaite v. Cartwright, For. 30; and see Corbett v. Maidwell, 1 Salk. 160. Goodall v. Rivers, Mos. 395. 400. Hall v. Carter, 2 Atk. 354.

(u) Hebblethwaite v. Cartwright,

For. 33.

(x) Sandys v. Sandys, 1 P. Wms. 709.

(y) Bacon v. Clerk, Cha. Prec. 500.

(z) Sandys v. Sandys, 1 P. Wms. 709. Codrington v. Lord Foley, 6 Ves. 364. Ravenhill v. Dansey, 2 P. Wms. 180.

rent, without issue male, the contingency was supposed to have happened: but, if the *time of payment* be also postponed there, it shall not be raised till the decease of the surviving parent, as it was, under a trust to raise a daughter's portion to be paid at twenty-one, or marriage, which should first happen when husband and wife should die without issue male. (a) And so it would have been in *Gerrard v. Gerrard*, under a trust to raise on failure of issue male to be paid at twenty-one, or marriage, which should first happen next after the decease of father and mother, or within six months after either of those days or times, had it stood upon the words "after the decease of the father and mother" only. (b)

But though the rule with respect to raising portions out of reversionary terms directly, the contingencies have happened, and the portions have become vested, is now perfectly established; yet the court feeling the inconvenience frequently arising upon the reversioner, by raising portions in this manner, will lay hold of any expression from which it can be inferred that it was the intention to postpone the raising till the term came into possession. (c)

As where the trust is to raise portions for daughters unmarried, and unprovided for at the decease of the father, which is a contingency that cannot be ascertained till his decease; (d) or where it is to raise after commencement of the term in possession; (e)

(a) *Champney v. Champney*, 10 Mod. 314. *Clinton v. Seymour*, 4 Ves. 440. The case of the Duke of Southampton mentioned in *Champney v. Champney* and 2 Vern. 641. will be found in Show. Par. Ca. 83. *Wood v. Duke of Southampton*.

(b) 2 Freem. 271.

(c) *Stanley v. Stanley*, 1 Atk. 548. 4 Vez. 460.

(d) *Corbett v. Maidwell*, 1 Salk. 159. S. C. 2 Vern. 655.

(e) *Churchman v. Harvey*, Amb. 335. *Butler v. Duncombe*, 1 P. Wms. 448. Where the trust was to raise from and after commencement of the term "without saying" in

or where there is a clause for maintenance, and a declaration that the residue of the rents, after maintenance, shall in the mean time, or until the portion becomes payable, be received by the person entitled to the reversion expectant on the determination of the same term, (*f*) or where the first payment of the maintenance is directed to be made after the term comes into possession, for maintenance must precede the portion. (*g*) In each of which cases it has been holden that the raising shall not be anticipated by the sale or mortgage of a reversionary term. Much more so, where there is a previous estate tail subsisting; (*h*) or where, independent of other circumstances indicating an intention of postponement, there is a general power of revocation in the parent with the consent of the trustees. (*i*)

If there be a power of appointment in the father for settling the children's shares by deed or *will*, it is clear that the children have no right to call for their portions in the life of the father; for the proportions and restrictions in and under which they are to take, as well as the times, may depend upon his will, which cannot take effect till his death. (*k*)

Nor can the father exercise his power of appointment by deed, so as to vest it in a child, and thereby eventually entitle himself to the portion as administrator and next of kin, by an arbitrary appointment. It being the meaning of a charge for children, that it shall take place when

possession, has been said to be more like an award than a decree,  
2 Ves. 334. 4 Ves. 462. 6 Ves.  
385.

(*f*) *Clinton v. Seymour*, 4 Ves.  
440. 461. *Stevens v. Dethick*,  
3 Atk. 39.

(*g*) *Brome v. Berkley*, 2 P.

Wms. 484. 3 Bro. Par. Ca. 437.

(*h*) 1 P. Wms. 454.

(*i*) *Reresby v. Newland*, 2 P.  
Wms. 93. S. C. 2 Bro. Par. Ca.  
487.

(*k*) *Codrington v. Lord Foley*, 6  
Ves. 364. 380. *Conway v. Conway*,  
3 Bro. C. C. 267.

it is wanted, and not before. The trust having given the father a discretionary power of raising it in his lifetime, will not in this respect assist him. For the meaning of such a power has been explained to be only to enable him to raise the money in his lifetime, if it should be necessary, for the child's marriage or for some other purpose. (*l*)

Where by the settlement there has been no time appointed for the vesting of a portion, in such case it seems that if a child attains a proper age, and does dispose of it by will, that the portion will nevertheless be raiseable, though that child, being a daughter, afterwards die under twenty-one and unmarried. This was decided by Lord Chancellor Jefferies, in the case of *Rivers v. The Earl of Derby*, so long ago as the year 1688; (*m*) the validity of which decision has since been recognized and approved of. (*n*)

But otherwise, if the children for whom portions are provided die before they want them; that is, as has been before explained, daughters under twenty-one and unmarried, and sons under twenty-one, and without having made any disposition by will. And the settlement is silent as to the time at which they shall vest. The portions of the children so dying will sink into the land for the benefit of the heir, or go over to the other younger children, according to the words of the trust; whether that be for the raising of so much for each younger child, in which case it will sink, (*o*) or for the raising of a certain sum for all the younger children generally, in which case, on death, or becoming an eldest child, it will go over to the survivors. (*p*) And,

(*l*) *Lord Hinchinbroke v. Seymour*, 1 Bro. C. C. 395.

(*m*) 2 Vern. 72.

(*n*) *Cowper v. Scott*, 3 P. Wms. 120. 2 P. Wms. 672.

(*o*) *Warr v. Warr*, Cha. Prec. 213. *Tournay v. Tournay*, Cha. Prec. 290.

(*p*) *Lord Teynham v. Webb*, 2 Ves. 198.

according to the event, whether *all* the younger children die under twenty-one, as to daughters unmarried, or not. (*q*)

So where no time is appointed for the vesting, but it is declared that the trustees shall within a certain time raise and pay, and a child dies before the expiration of that time, the portion shall sink, although the trustees might have raised it presently, and paid it to the child before his death. (*r*) But, in such case, the share of a daughter marrying and dying within the time shall not sink. (*s*)

The foregoing observations will shew how necessary are the precautions usually adopted by conveyancers, in penning provisions for portions; not only in declaring how they shall be raised, as by and out of the rents, issues, and profits (which, when confined to "annual," would include a power of leasing at rack rent,) (*t*) or by demising, (which means leasing upon fine,) (*u*) mortgaging or selling, (which last includes all the rest,) (*x*) or by any other ways and means to levy and raise: but also in pointing out the precise time at which the raising shall take place; as where there is a previous life estate, declaring that it shall be in the lifetime of the tenant for life with his consent, or else not till after his decease. (*y*) As also in expressing the particular times at which the portions shall vest and be payable, and the events upon which

(*q*) *Bruen v. Bruen*, 2 Vern. 439. S. C. Cha. Prec. 195.

(*r*) *Tournay v. Tournay*, Cha. Prec. 290.

(*s*) *Cowper v. Scott*, 3 P. Wms. 119. In *Tournay v. Tournay*, cited in the last note, the child died before it could want a portion, per Lord Hardwicke, 2 Ves. 209.

(*t*) *Havergill v. Hare*, Cro. Jac. 510. 3rd point.

(*u*) *Smith v. Evans*, Ambl. 633.

(*x*) 1 Ves. 42.

(*y*) This practice is noticed, 2 Atk. 357. See also 2 P. Wms. 99.; and *Lord Hinchinbroke v. Seymour*, cited in the last page.

the shares of the children shall go over ; (a) extending this provision to the accruing shares, as well as the original ; as also where the amount of the money depends on the number of the children in limiting the ultimate amount which shall become raisable according to the number of children attaining vested interests ; as also, we will add here, for the sake of considering the subject at one view, in declaring what sums of money shall be raisable for the maintenance of the children after the decease of the tenant for life until their portions shall become vested and payable, varying those sums according to the ages of the children, where the intention warrants it, and limiting the raising for maintenance, as is almost always intended, out of the *annual* rents and profits ; as also to remedy the inconvenience which may arise from postponing the vesting of the sons' shares till twenty-one, in giving the trustees a power of advancement, fixing the amount of such sum to be advanced, and declaring how, when, and for what purpose it may be raised.

By a long train of uniform decisions which have followed the case of *Poulet v. Poulet*, decided by Lord Keeper Guildford, in 1683, it has been settled that where there is a charge upon lands, to be raised and paid at a certain future period, and the person entitled to the charge dies before the period of payment arrives, that the money shall not be raised at all, but shall sink into the land. (b) And it will be the same as to the real estate, whether it be the primary or auxiliary fund for

(a) As upon sons dying under twenty-one, and daughters unmarried, or upon a younger child becoming an eldest, 2 Ves. 211. And see generally. 2 Ves. 334. *Fearne on Executory Devises*, 557. note, sec. 5. 6th ed.

(b) *Poulet v. Poulet*, 1 Vern. 204. *Duke of Chandos v. Talbot*, 2 P. Wms. 600. 612. and note, 5th ed. *Elwin v. Elwin*, 8 Ves. 547. *Butler's Co. Lit.* 237. a. no. 1. *Fearne, on Exec. Dev.* 555. note, 6th ed.



payment. (c) But, in the application of this rule, the courts have allowed those cases to be exceptions to it, in which the time of payment is postponed on account of the circumstances of the fund; taking a distinction between a postponement on account of the circumstances of the party, and a postponement on account of the circumstances of the fund.

Under the first of these distinctions falls the case of a portion to be raised and paid at twenty-one; wherein, if the child dies before that age, the portion shall sink; because the postponement is occasioned on account of the circumstances of the party, who is supposed not to want it till that age. (d) But if in the same instance it had been declared that the payment should not take place till the decease of a tenant for life, there such postponement will be held to be caused on account of the circumstances of the fund, by reason of the inconvenience attending the raising of money out of reversionary interests. And the portion shall be raised if the child attains the age of twenty-one, notwithstanding his death in the lifetime of the tenant for life, and consequently before the time allotted for payment. (e)

But where a legacy is given generally, which by the rules of law vests immediately on the testator's decease; and the land is charged therewith, as an auxiliary fund, to be levied and paid *within a year*; there it shall not sink; because the specifying that time is saying no more

(c) *Yates v. Phettiplace*, 2 Vern. 416. *Jennings v. Looks*, 2 P. Wms. 276. *Duke of Chandos v. Talbot*, 2 P. Wms. 612, 613. *Prowse v. Abingdon*, 1 Atk. 482. *Reynish v. Martin*, 3 Atk. 335.

(d) *Jennings v. Looks*, 2. P. Wms. 276.

(e) *King v. Withers*, Ca. temp. Talb. 117. S. C. 3 P. Wms. 414. 4 Bro. Par. Ca. 228. *Godwin v. Munday*, 1 Bro. C. C. 191. and cases there cited. *Bayley v. Bishop*, 9 Ves. 6. *Tunstall v. Brachen*,

*Ambl.* 167.

than a court of equity would say without those words—mere surplusage—and can make no alteration. (*f*)

So if the payment of a portion or legacy is made to depend on a condition, the performance of which rests with the trustee; as that it shall be paid at the end of two years, if certain debts shall be then paid; no fraudulent or unnecessary delay on the part of the trustee, will be allowed to affect the interest of the child or legatee; and, therefore, an enquiry may be directed to ascertain at what time the debts might have been paid, by a due application of the means of payment. (*g*) In this case, *i. e.* the one last cited, it was argued, that the portion must be considered to have vested at the expiration of two years from the testator's decease: but it was answered, and the Master of the Rolls alludes to it in his judgment, that a bequest over to the issue, in case any of the daughters should die before their portions shall become due or vest, as aforesaid, was indicative of a contrary intention.

The court leans against the allowing maintenance in the lifetime of the father; (*h*) but will readily decree it to be raised in the lifetime of the mother. (*i*) And if no maintenance be provided for the child till the portion becomes payable, the court will decree the trustees to raise a reasonable maintenance, not exceeding the interest of the expectant portion, for the law will not attribute to parents the unnatural intention of leaving their children destitute. (*k*) But this rule of allowing interest by way of maintenance, though not provided, is confined to the case of a portion provided by a parent; for if a pro-

(*f*) *Wilson v. Spencer*, 3 P. Wms. 172.

(*g*) *Bernard v. Montague*, 1 Mer. 422.

(*h*) *Corbett v. Maidwell*, 1 Salk. 159. 3 Atk. 43.

(*i*) *Staniforth v. Staniforth*, 2 Vern. 460.

(*k*) *Staniforth v. Staniforth*, 2 Vern. 460. *Harvey v. Harvey*, 2

P. Wms. 21. *Green v. Belchier*, 1 Atk. 505. 3 Atk. 438.

vision be made for a child by an uncle, or any other relation, the court will not allow interest till the time of payment. (*l*) So interest will not be allowed before the time for payment, though the provision be made by a grandfather or grandmother, (*m*) who are sometimes considered as parents. (*n*)

If the maintenance fall in arrear, the court will direct it to be raised from the father's decease. (*o*) But if the person entitled to the estate, subject to the charge, maintain the child, he will be allowed to set the maintenance against the interest of the money. (*p*)

And if a child die before the portion becomes vested, still the maintenance for the time such child lived must be raised, (*q*) but no longer. For where interest was given for the maintenance of a female child, and the trustees had power to raise the money within a certain time, the child died within the time allowed for the raising. Upon a bill brought by the husband for the portion and interest, the court, after observing that the interest of the money was designed for the maintenance of the wife, and that she was dead, ordered that there should be no interest paid from her death. (*r*)

Where a term is not to commence till the decease of a father; and it is provided, that after maintenance the residue of the rents shall be received by the person next entitled in remainder expectant, upon the determination

(*l*) *Crickett v. Dolby*, 3 Ves. Cha. Prec. 195. *Boycot v. Cotton*, 10. 1 Atk. 507. *Heath v. Perry*, 1 Atk. 556, 557.  
3 Atk. 101. (*p*) *Boycot v. Cotton*, 1 Atk.

(*m*) *Palmer v. Mason*, 1 Atk. 556.  
505. *Haughton v. Harrison*, 2 (*q*) *Brewin v. Brewin*, Cha. Prec.  
Atk. 102. 195. *Lyddon v. Lyddon*, 14 Ves.

(*n*) 2 Ves. 210. 566.

(*o*) *Ravenhill v. Dansey*, 2 P. (*r*) *Cowper v. Scott*, 3 P. Wms.  
Wms. 180. *Brewin v. Brewin*, 119.

of the term there, as no mortgage can be made till after his decease, it follows that no maintenance can be raised in his lifetime. (*s*)

But in all cases where the maintenance is a charge upon the estate, and cannot be raised till a future period, the arrears of it may be raised retrospectively, whenever the estate charged falls into possession. (*t*)

In decrees for maintenance, the child being otherwise provided for, is immaterial. (*u*)

If no maintenance be provided, portions will carry interest from the time of their becoming vested; and the rate of such interest will be four per cent.: (*x*) but where interest is given by the Court, on a legacy, or portion, by way of maintenance, then if the provision for children be scanty, in order to make a competent allowance, more than four per cent. has been allowed; (*y*) which rule, however, does not extend to cases where a maintenance has been provided by the deed or will, although it be less than the interest of the portion. (*z*)

We have seen that where a term for raising portions is dependent upon an estate in tail male, the portion will become raisable upon the death of either parent, without issue male; consequently, interest shall run from that time: but where a parent dies, leaving issue male, entitled under the entail; there, on the portion being raised, the interest

(*s*) *Stevens v. Dethick*, 3 Atk. 419. *Conway v. Longville*, 1 Eq. Ca. Ab. 301.

(*t*) *Hall v. Carter*, 2 Atk. 357. (*y*) *Incedon v. Northcote*, 3 Atk. 438, 439. 6 Ves. 540.; and

(*u*) *Ravenhill v. Dansey*, 2 P. Wms. 180. see 2 Ves. Jun. 512.

(*x*) *Lord Pomfret v. Lord Wind- sor*, 2 Ves. 487. *Sitwell v. Bernard*, 6 Ves. 540. *Hope v. Lord Clifden*, 6 Ves. 499. *Lyon v. Duke of Chandos*, 3 Atk. 419. *Hearle v. Greenbank*, 3 Atk. 697. 717. S.C. 1 Ves. 298.; and see *Mitchell v. Bower*, 3 Ves. 283. *Long v. Long*, 3 Ves. 286. n.

will be computed from the decease of the surviving tenant in tail. (a)

In the case of *Lyon v. Duke of Chandos*, (b) where, upon the marriage of the Marquis of Caernarvon, a term was limited for raising portions for the daughters of the marriage to be paid on the decease of the Marquis, who had also a power of having them raised in his lifetime; but the maintenance was not to commence till the decease of the Duke. The Marquis dying in the lifetime of the Duke, it was argued that the maintenance, being to commence after the decease of the Duke, and being in its nature to precede the portion, the portion could not be raised till the death of the Duke. But Lord Hardwicke thought otherwise; and decreed the portion to be raised with interest from the decease of the Marquis.

And in a case where a testator had declared that the term should cease on the remainderman's paying over the portion without saying, "and interest," it was held that he must pay interest also; and that the intention of the testator was to provide maintenance till the portions became payable, and interest afterwards. (c)

And in a late case, where the portions were not to be paid till after the decease of the survivor of father and mother, and there was a trust to raise interest for the maintenance of the children, till their portions became due and payable, upon a bill filed by one of the younger children for his portion, with interest from the decease of the father; the late Master of the Rolls, after having taken time to consider of it, in pronouncing judgment, said, that the provision of interest for maintenance was general, with no qualification whatsoever. But the eldest son had contended

(a) *Goodall v. Rivers*, Mos. 395. 464.

*S. C. Kely*, 2. 1 P. Wms. 454.

(c) *Hall v. Carter*, 2 Atk. 358.

(b) 3 Atk. 415. 4 Ves. 463,

that though the portions were (*d*) due and payable, yet interest was not to be paid during the life of the mother; that that was a qualification not warranted by the words, and would be contrary to the intention; the children were equally in want of maintenance during her life, as after her death: he, therefore, decreed interest according to the prayer of the bill. (*e*)

Moreover, a reversionary term may be sold for raising maintenance; (*f*) and it seems that it may be done under the words rents and profits only. (*g*) And though the consequence be very inconvenient; yet it must be raised from time to time as the maintenance becomes due, under the settlement. And the trustees may not raise, at once, more money than is wanted, and put out the surplus to interest. (*h*)

So the interest on portions ought to be paid annually, and ought not to be allowed to accumulate for the child; for it is given as a recompence for the principal in the mean time, and until it is due. (*i*)

The mortgage in all cases will be for the amount of the principal sum, and the arrears of interest. And the interest on that amount will be according to the market price of the day. In *Codrington v. Lord Foley*, the rate of interest allowed was 4*l.* per cent. before the filing of the bill, and 5*l.* per cent. afterwards.

Trustees, who are appointed to raise money for the

(*d*) Here the word "not" is inserted in the report: but the sense of the passage seems to require its rejection.

(*e*) *Lyddon v. Lyddon*, 14 Ves. 558. A case which seems to involve many nice questions relative to maintenance and interest on portions.

(*f*) *Greaves v. Mattison*, 2 Jon.

201. 2nd Resol. *Ravenhill v. Dansey*, 2 P. Wms. 180. *Pierpoint v. Lord Cheney*, 1 P. Wms. 493. 4 Ves. 464.

(*g*) *Hall v. Carter*, 2 Atk. 358. 14 Ves. 566.

(*h*) *Pierpoint v. Lord Cheney*, 1 P. Wms. 493.

(*i*) *Boycot v. Cotton*, 3 Atk.

553. 555.

payment of debts and legacies, must raise not only the principal money but all arrears of the interest; which interest, when the trust is to raise out of real property, varies in its rate according to the subject matter and other circumstances. But, upon this head it, seems only necessary to recollect the following rules:—

1st. That specialty debts shall carry interest; but that simple contract debts shall not, (*k*) unless there is some particular ground for it, as where the debtor has done something treating them as specialty debts, such as annexing a schedule of them to his will, or the trust deed. (*l*) And that, if a debt be to be paid at a certain day, the rate of interest shall be 5*l.* per cent. from that day: but that if it be payable upon demand, the interest will be 5*l.* per cent. from the demand. (*m*) A note payable at a day uncertain, or a shop debt, carries no interest. (*n*) But if, where a man devises his estates for payment of debts, his simple contract creditors file bills for a mortgage or sale, the simple contract debts will carry interest from the time of the master's report being confirmed. (*o*)

2nd. It has been settled that under a trust to pay debts a bond debt shall not, by arrears of interest, be allowed to exceed the penalty. (*p*) And that, under a trust or devise of real estate for the payment of debts, debts barred by the statute of limitations shall be paid, (*q*) though the rule is other-

(*k*) *Earl of Bath v. Bradford*, 2 108. S. C. *Barnard. Cha. Rep.* 221.  
*Ves.* 587. *Barwell v. Parker*, *ibid.* 1 Bro. *Cha. Ca.* 43.

363. *Tait v. Lord Northwick*, 4 (*p*) *Anon.* 1 *Salk.* 154. *Lloyd*  
*Ves.* 816. *v. Hatchet*, 2 *Anstr.* 525.

(*l*) *Stewart v. Noble, Vern. and* (*q*) *Anon.* 1 *Salk.* 154. *Blake-*  
*Scri.* 528. 2 *Ves.* 364. *way v. Earl of Stafford*, 1 *P. Wms.*

(*m*) *Upton v. Lord Ferrers*, 5 *Ves.* 373. *Jones v. Earl of Strafford*, 3  
803. *Lowndes v. Collens*, 17 *Ves.* 27. *P. Wms.* 89.; and *Cox's* note there.

(*n*) *Parker v. Hutchinson*, 3 *Ves.* *Iacon v. Briggs*, 3 *Atk.* 107. *Gaf-*  
135. *ton v. Mill*, 2 *Vern.* 111. *Andrews*

(*o*) *Lloyd v. Williams*, 2 *Atk.* *v. Brown*, *Cha. Prec.* 385.

wise, if the demand be very stale. (r) In *Lloyd v. Hatchett*, in the Exchequer, Thompson, Baron, said, that he remembered being counsel in a case of *Ketilby v. Ketilby*, before Lord Bathurst, where there was a devise for payment of debts. Simple contract debts, even for seventy years' standing, were renewed by this devise; and were paid with full interest: but the bond debts were only allowed interest to the amount of the penalty; and were, therefore, in a worse condition than those upon simple contract. (s)

3rd. That legacies charged on lands shall carry interest at the rate of 4*l.* per cent. per annum, from the time they become payable, which, if no time be appointed by the will, will be from a year after the testator's decease. (t) If it be to raise and pay, as soon as conveniently may be after his decease, it will be from the time of his death. (u)

THE CONSTRUCTION PUT UPON CERTAIN POWERS TO RAISE MONEY, AND THE MODE OF EXERCISING A TRUST OR POWER TO RAISE.

WHERE a power is given to one *quâ executrix* to raise a portion, and she has real estates also devised to her, it will be confined to the personalty. (x)

In a case where trustees of a public turnpike act had power to mortgage the tolls, but it was declared that there should be no priority amongst the creditors, the trustees

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| (r) <i>Oughterloney v. Powis</i> , Amb. 231.                                       | (t) <i>Sitwell v. Bernard</i> , 6 Ves. 520.   |
| <i>Legastick v. Cowne</i> , Mos. 391.; and see <i>Vaughan v. Cowne</i> , Mos. 245. | (u) <i>Spurway v. Glynn</i> , 9 Ves. 483.     |
| <i>Trueman v. Fenton</i> , Cowp. 548.; and <i>Anon.</i> 2 Vern. 205.               | (x) <i>Doe v. Milborne</i> , 2 Term Rep. 721. |
| (s) 2 Anstr. 527.  |   |



granted a mortgage of all the tolls (not any aliquot part); and the toll-houses and toll-gates were also inserted in the mortgage. And the questions made were, 1st. Whether the trustees had any authority to mortgage the toll-houses and toll-gates? And, 2dly, Whether, in an ejectment brought, they were not estopped by their own deed? The Court held that the act gave no authority to mortgage the toll-houses and toll-gates, for by that means a creditor might gain a priority, which the act had denied; and that as the trustees were not acting for their own benefit, but for the benefit of the public, they were not estopped. (y) In a subsequent case Lord Eldon, addressing himself to the judgment of the Court, in this case, thought that the principal difficulty arose from the mortgage comprising all the tolls, and not of a proportion, denying that in the latter case any priority would have been gained since the lessor of the plaintiff would become the bailiff of the rest of the creditors as to all except his own proportion. (z) But in the principal case of *Doe ex dem. Banks v. Booth*, the act having empowered the trustees to "mortgage the tolls or any part or parts thereof, and the turnpikes and toll-houses for collecting the same;" and the trustees having mortgaged such proportion of the tolls as the money advanced bore to the whole sum due and owing on the credit thereof; and by a subsequent deed having demised the turnpikes and toll-houses also; the Court held that the mortgagee might maintain an ejectment for the toll-houses and gates. In the same case it was observed that there was a great difference between a demise of tolls, and of toll-houses. The former only gave a personal interest, in respect of which an action for money had and received might be maintained; the latter gave an interest

(y) *Fairtitle v. Gilbert*, 2 Term Rep. 171.

(z) 2 Bos. & Pul. 222, 223.

in land, which was within the statute of mortmain. The money advanced by the mortgagee would be very ill secured, if his only remedy was either an application to the vindictive power of the Court of King's Bench, or a suit in Chancery, in which all the other thirty-five mortgagees must be made parties. And that, with respect to the action for money had and received, it would be a sufficient defence for the trustees to shew that they had distributed all the money received according to the provisions of the act. (a)

Where lands are devised to trustees for the payment of debts, and they convey to the heir subject to the trust, a mortgage made by the heir will be good; and the mortgagee will not be answerable for the misapplication of the money. (b) But the trustees will be answerable because of their having been guilty of a breach of trust; (c) which, however, may be avoided by their disclaiming the devise. For where a trustee *conveys* the land to another, he does, in fact, first accept the trust, and that part of the trust which consists in the application of the money he cannot convey away. (d) And it has now been determined that a freehold may be disclaimed by deed without matter of record. (e)

Where a charge is created by will for the payment of debts and legacies, or portions, and the personal estate is also subject to them, a trustee ought not to mortgage until both the personal estate and the rents of the lands have been first applied. (f) And the Court of Chancery will not, in such case, decree a mortgage without first directing

(a) Doe ex dem. Banks v. Booth, 225.

2 Bos. & Pul. 219.

(d) Crewe v. Dicken, 4 Ves. 97.

(b) Hardwick v. Mynd, 1 Anstr.

(c) Townson v. Tickell, 3 Barnw.

109.

and Ald. 31.

(c) Hardwick v. Mynd, 1 Anstr.

(f) 2 Ves. 590.

109. Burt v. Dennett, 2 Bro. C. C.

an account of the personal estate, and the rents and profits of the land. (*g*)

So where the trust is silent as to the mode of alienation, or has given the trustee a choice of alienation, the Court has evidently shewn a preference to a smaller alienation over a greater, as by directing a lease at a fine, in the first instance; and if that is insufficient to raise the money, then a mortgage. (*h*) Upon the same principle a mortgage will be preferred to a sale. (*i*) And a mortgage of part of the estate will be preferred to a mortgage of the whole; (*j*) and a mortgage for years to a mortgage of the fee. (*k*)

But no certain rule can be laid down on the subject, as the mode of raising is liable to be guided by the circumstances of each particular case; and is, therefore, frequently left to the master and the parties. (*l*)

Trustees, however, are not obliged to wait for a decree of the Court for raising the money; and may exercise their power of discretion of doing it by sale or mortgage: and the Court has always supported it. (*m*)

But the heir or person in remainder may have the charge raised by a mortgage, if it be more beneficial for him, though the persons entitled to the money oppose it; (*n*) more particularly if the land, subject to the trust,

(*g*) *Berry v. Askham*, 2 Vern. 26. *Dick*. 607. Decree in *Mosley v. Talbot v. Duke of Shrewsbury*, Cha. Mosley, 5 Ves. 248.  
Prec. 395. *King v. Withers*, 3 (*j*) 5 Ves. 259.  
P. Wms. 414. *Ridout v. Dowd-* (*k*) See sect. 1. ante.  
ing, 1 Atk. 418. (*l*) As it was in *Trafford v. Ash-*

(*h*) See the decree in *Meynet v. Massey*, 2 Vern. 1. *Raithby's Ed.* *ton*, 1 P. Wms. 419.; and in *Mos-*  
*ley v. Mosley*, 5 Ves. 259.

(*i*) See Lord Cowper's decree, and the proceeding thereon, *Mills v. Banks*, 3 P. Wms. 2. The decree of the master of the Rolls, in *Bacon v. Clerk*, 1 P. Wms. 480. *Lingard v. Derby*, 1 Bro. Cha. Ca. 311. (*m*) Per Lord Chancellor Hard-  
wick, in *Earl of Bath v. Earl of Bradford*, 2 Ves. 590.

(*n*) *Warburton v. Warburton*, 2 Vern. 420. *Bacon v. Clerk*, 1 P. Wms. 480.  
2 Ves. 590. *Bell v. Maidman*,

be given to one for life, the Court will not allow the trustees to liquidate by rents and profits, as that might exhaust the life interest. (*o*) But where the trust has expressly limited it to a raising by annual rents and profits, and there is no time limited for payment, a mortgage will not be decreed, though, subject to the charge, the estate be given to one for life. (*p*)

If the tenant for life refuse to shew the deeds so as to enable the trustees to mortgage, the Court will appoint a receiver. (*q*)

Trustees to raise money for the payment of debts may mortgage at any distance of time after the creation of the trust, provided the debts be outstanding. (*r*)

And trustees are not obliged to mortgage to the whole extent of their power at once, but may do it at several times. (*s*)

In a general way the proviso in mortgages, by trustees, will be as it was in the deed stated in *Codrington v. Lord Foley*, *i. e.* for redemption on payment by the person or persons, who, for the time being, shall be entitled to the premises comprized in the term immediately expectant on the determination thereof. (*t*) The covenants, on the part of the trustees, will be confined to a covenant, that they have done no act to incumber. And unless the person entitled to the land joins, and is willing to enter into such a covenant, the mortgagee can have no covenant for the payment of the money. If the deed raising the trust to mortgage contain prior estates, or powers given to any other persons except the trustees, the mort-

(*o*) *Wilson v. Spencer*, 3 P. Wms. Mad. 47.

174.

(*r*) *Redington v. Redington*, 1

(*p*) *Ivy v. Gilbert*, 2 P. Wms. 13. Ball & Beat. 131.

S. C. 2 Bro. P. C. 468. Evelyn v. (*s*) 2 Term Rep. 725.

Evelyn, 2 P. Wms. 659.

(*t*) 6 Ves. 369.

(*q*) *Brigstocke v. Mansel*, 3

gage must be made subject to the prior estates, and to the estates which may be created under those powers. (u) And if, on the contrary, there be a power to charge and limit a term for raising the money, a charge under such power will over-reach the other estates limited by the same settlement, and a mortgage under such power will take effect of all such other estates. (x) Wherefore, in all instruments, creating powers, it is usual to declare what estates the estates limited by virtue of the powers shall be subject to, and what they shall over-reach.

Where by act of Parliament a power is given to mortgage, the form of such mortgage is frequently prescribed by the act, as we find it done by the 24 Geo. 3. c. 53. (y). But where that is omitted, it seems that the form there prescribed might be effectually used as a guide; in which case the operative words would be "mortgage and charge."

THE EFFECT WHICH A MORTGAGE SHALL HAVE UPON A POWER WHICH AUTHORIZES A MORTGAGE OR SALE, AND WHEN A TRUST OR POWER TO RAISE MONEY SHALL BE HELD TO BE SATISFIED.

Where the trust is by mortgage or sale to raise and pay debts, it seems that if the trustees mortgage the whole for a sum insufficient to answer the purpose, that they are not debarred from exercising their power to sell at any subsequent period. This point was raised, but not decided, in a late case. Graham (Baron) said,

(u) *Saville v. Saville*, cited 1 P. 244.

Wms. 455. *Hall v. Carter*, 2 Atk. (y) 2 Bos. and Pul. 219. 57 356. S. C. *nom. Carter v. Carter*, Geo. 3. c. 62. Local and Personal Mos. 365. Acts.

(x) *Beale v. Beale*, 1 P. Wms.

that the provisions in the deed of trust were so made as to leave it very doubtful whether the trustee, having chosen the mode of a mortgage and a partial sale, could afterwards, of his own authority, execute those trusts; and of that he had great doubt. He did not mean to say whether the creditors must thereby lose the benefit of the trust, or whether the trusts did not devolve upon a court of equity. In the same case it was noticed that the question had been referred to counsel, who thought the power of sale was gone. But, upon the principle recognized by Lord Kenyon, that a power (which is of stricter construction) might be executed at different times, provided the party did not in the whole transgress its limits, (z) there appears no reasonable objection why the trustees, not having at first raised sufficient to answer the purposes of the trust, may not afterwards, of their own accord, mortgage or sell. In the same case, the opinion of Chambre, J. in favour of this construction is very strongly expressed:—"By the mere act of mortgaging, I cannot think" he is reported to have said "the trustees have at all bound themselves. It would be strange to say, that the trustees having by mortgage raised a sum insufficient, the trust must remain unexecuted, and proceed no farther. There is no weight, therefore, in that objection." (a)

But it is clear that, in a case of this kind, the mortgagee cannot compel the trustees to make a sale; in order to pay himself off; he has all the remedies, but only the remedies of a mortgagee. (b) And it is very doubtful whether the trustees could sell for that purpose, after having mortgaged to the whole extent of their power, if

(z) 2 Term Rep. 725. *Zouch v. 722.*

*Woolston*, 2 Burr. 1136.

(b) *Palk v. Clinton*, 12 Ves.

(a) *Omerod v. Hardman*, 5 Ves. 46.

they were willing. (c) From the opinions of both the Judges, expressed in *Omerod v. Hardman*, there is every reason to believe that they could not.

If trustees, instead of raising money according to their trust, allow one to enter who receives the rents, the Court will not decree a mortgage or sale, without first directing an account of the rents and profits received by the person so let into possession, and will hold the trustees answerable for so much of the rents as he may have received. (d)

And where trustees exceed their power, as where they have a mere power to raise by leasing for lives or years, and they mortgage in fee, in which case the mortgage is void, the Court will so far assist the mortgagee as to direct an inquiry how far the land might have been chargeable by leasing, and whether any lives were vacant. (e)

If trustees once mortgage to the whole extent of their power, that is, if they once raise as much money as their trust authorizes them to raise, they cannot mortgage again, though the money previously raised hath been misapplied; for the land hath borne its burden once, and shall for ever afterwards be discharged. (f)

(c) 12 Ves. 56.

(d) *Okeden v. Okeden*, 1 Atk. 550.

(e) *Ivy v. Gilbert*, 2 P. Wms. 13.

(f) *Anon.* 1 Salk. 153. In

*dom. Proc. Carter v. Barnardiston*, 1 P. Wms. 518. *Juxon v. Brian*, Cha. Prec. 143. 2 Ves. 603. 5 Ves. 736. *Hutchinson v. Massareene*, 2 Ball and Beat. 49.

## SECTION IV.

## MORTGAGES TO TRUSTEES.

A POWER to trustees to lend out trust-money on good and sufficient security, authorizes them to lend it upon a landed security; (g) but will not authorize a loan upon the mere personal security of a bond. (h)

If the power be to lay out money on *real* or government security, it seems that under such authority an investment on a mortgage of leaseholds may be made the words *real securities*, in the construction of law meaning *landed securities*. (i) The only consideration, therefore, for the trustees, under such circumstances, seems to be the sufficiency of the security. (k) But trustees or executors for infants, who are not expressly authorized to invest on real securities, cannot lend trust-moneys on mortgage of lands, without an express order of the Court; and the Court will not make an order for that purpose, unless under very special circumstances, as where there is a mortgage or charge on the infant's estate. (l)

- (g) *Terry v. Terry*, Gilb. Eq. Bowles, 3 Atk. 808.  
Rep. 10. (k) In *Mills v. Banks*, 3 P.  
(h) *Wilkes v. Steward*, Coop. Wms. 2. a loan by executors in  
Cha. Ca. 6. *Langston v. Olivant*, trust on security of 200 years  
*ib.* 33. *Holmes v. Dring*, 2 Cox 1. term, approved of by the Master.  
*Terry v. Terry*, Gilb. 10. (l) *Norbury v. Norbury*, 4 Mad.  
(i) See *Attorney-General v.* 191.



## CHAPTER III.

## OF THE MORTGAGEE.

**T**HE interest of the mortgagee may be regarded in a two-fold point of view :—1. His interest in a court of law ; and, 2. His interest in a court of equity.

His interest in a court of law is almost exclusively confined to his interest in the estate, of which he is considered to every intent and purpose the lawful owner, as tenant upon condition until the condition forfeited ; during which time only he is more emphatically, and in a legal sense, called the mortgagee, and as absolute owner ever afterwards.

But as equity considers the transaction as a loan of money only, it will prevent this legal interest of the mortgagee from extending itself so far as to prejudice the mortgagor beyond the claim for the money, except it be by an equitable proceeding. And, as a further consequence of this, its first consideration will look also to the interest of the mortgagee in the money.

To prevent the first legal consequence of the mortgage deed, which is, that the mortgagee may enter and hold until the time allotted for the performance of the condition, or, in other words, until the time allotted for the repayment of the mortgage money, a provision is almost invariably inserted in the mortgage deed, that the mortgagor shall continue in possession until he makes default in payment of the mortgage money, according to the condition.

Under this agreement the mortgagor becomes tenant at will to the mortgagee ; which tenancy at will the

mortgagee seldom interrupts, unless for the purpose of procuring payment of his principal money or interest.

This power of interruption, subsisting in the mortgagee, may be prosecuted either in a court of law, or in a court of equity. If the mortgagee elects to proceed at law, the mode of his proceeding must be guided by the circumstance of the estate, whether it be in the occupation of the mortgagor, or of a tenant; and if of a tenant, whether of a tenant claiming under a lease prior to the estate of the mortgagee, or subsequent.

If the estate be in the occupation of the mortgagor, the legal method of acquiring the possession is, for the mortgagee to proceed by ejectment; for the law will not allow him to make a forcible entry upon the mortgagor, and so oust him, as that would be an infraction of the peace. And, in such proceeding by ejectment, it is held that the mortgagor is not entitled to any notice to quit; for he is, in the strictest sense, a tenant at will to the mortgagee. (a) And as against the mortgagor, he, the mortgagee, is entitled to the estate as it is, with all the crops growing on it. (b)

But if the estate be in the occupation of a tenant claiming under a lease granted prior to the estate of the mortgagee, the mortgagee may acquire possession by the attornment of the tenant. For, by the 11 Geo. 2. c. 19. s. 11. which declared that the possession of the landlord or lessor should not be altered by the attornment of any tenant, an express saving is inserted for attornments made by the direction of a court of justice, with consent of the landlord or lessor, or to any mortgagee after the mortgage is become forfeited.

And because by the 4 Anne, c. 16. (c) which took

(a) 3 East. 451.

(c) See sect. 9. and 10.

(b) 1 Term Rep. 383.

away the necessity of attornment on grants of reversions, it is declared that no tenant shall be prejudiced by payment of rent to the original landlord, or by breach of any condition for non-payment before notice. The mortgagee must give notice of his claim to the tenants, which notice is usually evidenced by their signing a writing, purporting that they have attorned to the mortgagee; and, as a further evidence of this attornment, though either act would be sufficient, (*d*) they are in general made to pay a small proportion, as a penny or a shilling of their rent.

But though such evidence of notice is frequently obtained where the tenants are willing to accord, for the satisfaction of the mortgagee, yet there is no positive occasion for it; for, under the ninth section of the same statute, any notice will be sufficient to entitle the mortgagee to receive the rent, as well the arrears which may be due at the time of giving the notice, as all that may subsequently accrue; and the mortgagee may from that time maintain an action for it, or distrain. So that if the tenant, after such notice, pays his rent to the mortgagor, or to any other person claiming under the mortgagor, but subsequently to the mortgage, he does it at his peril. (*e*)

In Lord Mansfield's time, indeed, a mortgagee was allowed to recover possession of the rents by ejectment against a tenant under a lease prior to the mortgage, if he gave notice to the tenant that he did not intend to deprive him of the possession: (*f*) but that was proceeding upon an equitable principle; for the rule of law is, that in ejectment the legal title shall prevail, and there is

(*d*) Lit. sec. 551.

Rep. 378.

(*e*) Moss v. Gallimore, Doug.

(*f*) White v. Hawkins, in note,

279. Lumley v. Hodgson, 16 East Doug. 23. Bull. N. P. 96.

99. Birch v. Wright, 1 Term

no doubt that at this day a mortgagee would not in such case be allowed to maintain an ejectment. (g)

But as to any advantage which may accrue by reason of any breach of covenants in the lease, the law with respect to the mortgagee is the same as with respect to any other grantee of a reversion. (h)

If the estate be in the occupation of a tenant from year to year, at the time of the mortgage, he is entitled to six months' notice to quit; for the mortgagor could not have recovered in an ejectment against him without such notice, and the mortgagee claiming under him could not be in a better situation. (i)

And after ejectment the mortgagee may recover all the rent in the tenant's hands which have become due since the mortgage, up to the time of the demise, in an action for use and occupation. (j)

If the estate be in the occupation of a tenant claiming subsequently to the estate of the mortgagee, whose lease has not been confirmed by the mortgagee, it is discretionary with the mortgagee whether he accepts the rent, and continues the occupation of the tenant, or whether he proceeds by ejectment to recover possession of the land. And if he elects the latter mode, there is no occasion for any notice to quit, any more to the tenant than to the mortgagor; for the tenant, coming in under the mortgagor, cannot be in a better condition than the mortgagor. And this right of proceeding against the tenant, without giving notice to quit, extends itself to the assignee of the mortgagee, though the tenancy was created previously to the assignment, provided it was subse-

(g) Goodtitle v. Jones, 7 Term Rep. 47.	(h) 1 Term Rep. 381.
Doe v. Sybourne, 7 Term Rep. 2.	(i) 1 T. R. 379, 380. 2 Sch. and Lef. 30.
Serjeant Frere's note to Doug. 23.	(j) Birch v. Wright, 1 Term Rep. 378.
Adams on Ejectment, 33.	

quently to the mortgage, and provided that the tenant never had any possession under the mortgagee, from whence any tenancy could be inferred. The mortgagee's having had notice of the occupancy is not, it seems, sufficient from whence to infer a tenancy or possession under him. (*k*)

The modes in which equity will assist a mortgagee to his principal money and interest are principally three:—1st, By the appointment of a receiver; 2nd, By an order for sale; and, 3d, By a decree of foreclosure. A foreclosure, being the mode by which the mortgagee may acquire the estate absolutely for himself, and by which all relationship of mortgagor and mortgagee may be made to cease, we will reserve for our future consideration. The two former seem to merit our present more particular regard.

The appointment of a receiver of the rents and profits of an estate is generally for the purpose of keeping down the interest on incumbrances. If it be intended that the receiver shall do more than just keep down the interest, it must be specified in the order. (*l*) A receiver, when appointed, must first give security for the due performance of his office. The appointment is made by the Master under the direction of the Court, and the parties may object to the appointment; and the order to appoint a receiver contains also an order that the tenants do attorn and pay their rents to such receiver. (*m*) The security, which the receiver should give, is a recognizance with two sureties; and the taking an assignment of a mortgage belonging to the receiver instead of it is very improper. (*n*)

The appointment of a receiver is a juridical exercise of

(*k*) *Keech v. Hall*, Doug. 21.      (*m*) *Mr. Dickens' note*, 2 Dick. 630.  
*Thunder v. Belcher*, 3 East. 449.

(*l*) *Gresley v. Adderley*, Swanst. 573.      (*n*) *Mead v. Lord Orrery*, 3 Atk. 237. 214.

the authority of the Court of Chancery, which it will seldom withhold where the applicant is interested in a due application of the profits. (o) And, therefore, where a mortgagee, after having assigned part of his mortgage, applied for a receiver, the application was granted, though the assignee, being also the tenant in possession, objected to it. (p) Upon the same principle it seems that a receiver would be appointed upon the prayer of one of two mortgagees, as joint-tenants, or tenants in common.

Where a mortgagee is in possession, the Court will not, upon an application by a second mortgagee, appoint a receiver, provided the first mortgagee can swear what sum he believes to be due to him upon the mortgage. (q)

Where the first mortgagee is not in possession, the Court has sometimes refused to appoint a receiver without his consent, on the ground that the first mortgagee may at any time recover the possession by ejectment. (r) But it seems that in such case there can be no objection to the appointment of a receiver, if it be made without prejudice to the right of the first mortgagee to recover possession. (s) But the Court will not, in general, appoint a receiver to keep down the interest of a prior incumbrance, unless the prior mortgagee refuses to enter. (t)

Where a receiver has been appointed on the behalf of a variety of incumbrancers, he cannot afterwards be discharged without the consent of all. (u)

Where a receiver is in possession, a mortgagee cannot

(o) 3 Ves. 32.

and Wells, 2 Dick. 608. Price v.

(p) Archdeacon v. Bowes, 3 Anstr. 752.

Williams, Coop. C. C. 31.

(q) Codrington v. Parker, 16 Ves. 469. Quarrell v. Beckford, 13

(s) Bryan v. Cormick, 1 Cox, 422.

Ves. 377. Chambers v. Goldwin, as cited 9 Ves. 377.

Dalmer v. Dashwood, 2 Cox, 378.

(t) 1 Ves. 268.

(r) Phipps v. Bishop of Bath

(u) Largan v. Bowen, 1 Sch. & Lef. 296.

bring an ejectment without the previous leave of the court, which leave, in a proper case, will be granted as a matter of course. (v)

Upon an application for leave to bring an ejectment where a receiver is in possession, there is not the same necessity for a reference to the master that the party may be examined *pro interesse suo* prior to its being granted, that there is where the estate is in the possession of sequestrators. (x) For both in the case of *Angel v. Smith*, (y) and in the anonymous case (z) before Lord Eldon, in 1801, in each of which a receiver was in possession, an ejectment was permitted without any previous order to be examined *pro interesse suo*. But it should be observed that there seems to be no just ground for the distinction; and that the question cannot be considered to be at rest. (a)

If a mortgaged estate be in the possession of sequestrators, the mortgagees may have the money in the hands of the sequestrators applied in part discharge of what is due to them upon their mortgage, after paying thereout the sequestrators their costs, and the costs of the application; and the sequestrators will be ordered to give up the possession of the estate to the mortgagees. (b)

Where the mortgagor becomes bankrupt, the mortgagee cannot prove under the commission, and then resort to his security for the residue. (c) But he may, under the general order, first pray a sale of the mortgaged premises; and if the money produced thereby is insufficient to pay the expences of the sale, and his principal, interest, and

(v) *Angel v. Smith*, 9 Ves. 335.  
Anon. 6 Ves. 287.

(x) See and consider the two cases cited in the last note.

(y) 9 Ves. 335.

(z) 6 Ves. 287.

(a) *Swanst.* 579. 6 Ves. 288.  
*Hunt v. Priest*, 2 Dick. 540.

(b) *Walker v. Bell*, 2 Mad. 21.  
*Hamlyn v. Lee*, 1 Dick. 94.

(c) *Ex parte Grove*, 1 Atk. 104.

costs, then come in as a creditor under the commission. (*d*) This order extends only to legal mortgages; for a mortgagee of the equitable interest must still proceed, as was the practice before the making of this order, by petition and a special order for sale. (*e*) The ground of which exclusion seems highly reasonable; since on equitable mortgages, as we may have observed in considering mortgages by deposit of title deeds, the Court is frequently called upon to decide very nice and difficult questions. The validity, therefore, of an equitable mortgage is decided by the Court without a reference to the commissioners; though, when such its validity is established, it will, if necessary, refer it to the commissioners to ascertain what is due upon it, that being matter of account. (*f*)

But in such case of an equitable mortgage, if there be also a subsequent mortgagee, who has not proved under the commission, or a purchaser of the equity of redemption, who objects to a sale upon a petition for that purpose by the first mortgagee, the only remedy for the first mortgagee is by bill. (*g*) For even in the case of a legal mortgage, where the equity of redemption is not in the bankrupt, the commissioners cannot, under the general order, direct a sale; (*h*) nor can they compel a second mortgagee, not claiming under the commission, but relying upon his security to join in a sale obtained by a first mortgagee. (*i*) The only way, therefore, to make a title in this case is for the creditors to redeem both mortgages. But if the second mortgagee be present at the

(*d*) General Order, 8th March, 1794. Stated at length, 2 Cooke's B. L. 284. Whitmarsh's B. L. 478. 331. (*f*) Ex parte Jennings, 1 Mad. 38.  
 4 Bro. Cha. Ca. 518. (*g*) Ex parte Topham, 1 Mad. 38.  
 (*e*) Ex parte Payler, 16 Ves. 435. (*h*) Ex parte Topham, 1 Mad. 38.  
 Ex parte Donald, 6 Feb. 1806, contra, there said to be questioned. Ex 1 Mad. 38 n. (*i*) Ex parte Jackson, 5 Ves. 357.



time the order for sale is made, and suffer the sale to go on, he cannot afterwards object to joining. (*k*)

It is no answer to an application by an equitable mortgagee for sale that the lease contains a provision for forfeiture in case of an assignment without the lessor's licence, and that no licence has been obtained, because the lessor may waive the forfeiture; and as against the assignees the mortgagee has a right to avail himself of the advantage he has by possession of the lease. (*l*)

A mortgagee having once elected to prove, under the commission, as a creditor, cannot afterwards retract, and betake himself to his security. (*m*)

A sale by a mortgagee, under the above-mentioned general order, is liable to the auction duty. (*n*)

The mortgagee may pursue all his remedies at once, as bring an ejectment to recover possession of the land, an action on the covenant to repay, and a bill of foreclosure at the same time; and equity cannot stay the proceedings at law, unless the mortgagor will bring the money into Court, according to the provisions of the 7 Geo. II. (*o*)

But if the mortgagee have it not in his power to put the mortgagor in exactly the same situation that he was prior to the mortgage, the Court of Chancery will restrain the proceeding until such time as he can; and in the mean time order the money into Court. Thus where a mortgagee had parted with the title deeds, and then instituted proceedings at law, an injunction was granted to stay the proceedings; and it was referred to the master to compute what was due for principal, interests, and costs, and the

(*k*) Per Loughborough, Chan. in  
Ex parte Jackson, 5 Ves. 358.

(*l*) Ex parte Baglehole, 1 Ro. Ba.  
Ca. 432.

(*m*) Ex parte Downes, 18 Ves.  
290,

(*n*) Coare v. Creed, 2 Espi. 699,  
The King v. Abbot, 3 Pri. 178.

(*o*) Rees v. Parkinson, 2 Anstr.  
497. Burnell v. Martin, Doug. 417,

2 Ves. 678.

costs of the proceeding at law ; and it was ordered that the money should be paid into the bank to remain until the title deeds could be given up, and a reconveyance had. (*p*) And where a mortgagee died without any heir that could be discovered, the Court restrained the executor of the mortgagee from proceeding at law to compel payment of the money, there being no heir who could reconvey. And the money was ordered into court until the executor should find the heir. The cause remained in court many years, until at last it was thought worth while to get an act of Parliament to revest the estate, on an allegation that the heir could not be found, and the crown giving its consent. (*q*)

So, if there is ground to presume the mortgage satisfied, the court would decree an injunction to stay proceedings at law till that is determined. (*r*)

A mortgagee may also pursue his different remedies successively, and in any order he pleases. Thus, after having foreclosed, he may maintain an ejectment to recover possession ; (*s*) or he may sue on the covenant or bond : and equity will not, in such case, grant an injunction to stay the mortgagee's proceedings at law, unless the mortgagor will pay the money into court. (*t*)

But if a mortgagee, after having obtained a foreclosure, sells the estate ; and six years afterwards, the produce of the sale being insufficient to pay the debt, brings an action for the residue or balance, which is inconsiderable ; the court, under these circumstances, would restrain the mortgagee from proceeding at law. (*u*) But if there was any

(*p*) *Schoole v. Sall*, 1 Scho. & Sutton *v.* Stone, 2 Atk. 101. Lef. 176.

(*q*) Case stated by Lord Redesdale, 1 Scho. and Lef. 177. (*t*) *Aylet v. Hill*, 2 Dick, 551. Tooke *v.* Hartley, 2 Dick. 785. S. C. 2 Bro. C. C. 125.

(*r*) *Booth v. Booth*, 2 Atk. 343. (*u*) *Perry v. Barker*, 13 Ves.

(*s*) *Pye v. Daubuz*, 2 Dick. 759. 198. S. C. 8 Ves. 527.

chance that the mortgagee could get back the estate from the vendee, in order that he might reconvey to the mortgagor, if he chose to redeem; there, it seems, that equity would not make a perpetual injunction against the mortgagee. (x)

Where, however, the mortgagee, after a foreclosure, proceeds on the bond or covenant, it will open the foreclosure. (y)

If the mortgagee or his assignee, in the name of the mortgagee, as it must be, bring an action upon his bond, the mortgagor shall pay no more than is actually due: but if, upon the covenant, the account must be settled in that action. (z)

In debt, where the plaintiff declared that the defendant bound himself, his heirs, executors, and administrators, to pay the mortgage money, upon *non est factum* pleaded, and it appearing that the defendant bound only himself, his executors, and administrators, it was held by the court that the variance was immaterial, both in consequence and effect, whether the defendant bound his heirs or not. And, per Bayley, J., the judgment would bind his heirs, whether he bound them by the deed or not. (a)

If mortgage money be secured to be paid by instalments, and also by a warrant of attorney, the condition of which is, that no execution be issued until default made in payment, with interest as aforesaid, by the instalments and in manner hereinbefore mentioned; one default will entitle the mortgagee to take out execution for the whole. And, per Dampier, J., "I doubt much if, in point of law, the party could take out a second execution." (b)

(x) 13 Ves. 205.

(z) 4 Ves. 129.

(y) *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317. pl. 3. and cases cited in two last notes. But upon this see more *post* in Chapter on Foreclosure,

(a) *Hamborough v. Wilkie*, 4 Maul. and Selw. 474. note.

(b) *Leveridge v. Forty*, 1 Maul. and Selw. 706.

In like manner, where the mortgagee agrees to let the principal remain for a certain time, unless the interest shall at any time be in arrear, one default in payment of the interest, will entitle him to call in his money. (c)

The 7 Geo. 2. c. 20. after reciting that mortgagees frequently bring actions of ejectment for the recovery of lands, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained; and likewise commence suits in equity to foreclose their mortgagors from redeeming; and the courts of law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal monies and interests due on such mortgages and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a court of equity for that purpose; in which case, likewise, the courts of equity do not give relief until the hearing of the cause, enacts "that where any action shall be brought on any bond for payment of the money secured by any mortgage, or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of the Courts at Westminster, the Great Sessions in Wales, or the Superior Courts in the Counties Palatine, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments; and no suit shall be depending in equity touching the foreclosing or redemption thereof, if the person or persons having right to redeem, and who shall appear and become defendant or defendants in such actions, shall at any time pending such action pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into court where such action shall be depending all the principal monies

and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage, (such money for principal, interest, and costs, to be ascertained by the court wherein such action shall be depending, or by the proper officer by such court to be appointed for that purpose,) the monies so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage." And that the court may, by rule, compel the mortgagees, at the costs of the mortgagors, to reconvey the mortgaged lands, and to deliver up all documents relating to the title in their possession.

By the second section of the same statute it is enacted that, upon bills to foreclose, the court may, upon the application of the defendants in such suits, having right to redeem, and upon their admitting the rights of the plaintiffs, make such orders therein before the hearing of the cause or suit as they might have made if the same were regularly brought to a hearing.

And the third section declares, that the act shall not extend to cases where the right of redemption is controverted, or where the money due is not settled, or to prejudice any subsequent mortgagee or incumbrancer.

Upon this statute it has been holden, that the rule with respect to tacking in an ejectment shall be the same as in equity: therefore, upon a reference to the Master, the court has refused to tack a bond debt, as against the mortgagor or his assignee of the equity of redemption, but has intimated that it might be done against the heir; (*d*) because in equity a mortgagee may tack a bond debt against the heir, but not as against the mortgagor or his assignee, So if the plaintiff in ejectment has two mortgages from the

(*d*) Archer v. Snatt, 2 Stra. notes, 182,

†107. Bingham v. Gregg; Barnes,

same person, and the defendant applies to stay proceedings, he must pay what is due upon both mortgages, and cannot be admitted to redeem one only. (e)

And further, that the plaintiff cannot set up an indeterminate demand, but that its nature and amount should be stated: for the defendant must know the claim, otherwise he cannot admit it; and without this the object of the statute would be defeated. (f) Though in a case where the mortgage deed enabled the mortgagee to sell, and upon an ejectment and a rule obtained upon the statute, the mortgagee having set up a claim for some expences occasioned by a sale under the mortgage deed, the Chief Baron observed that the only charge specified was of a nature which might be very well settled by the reference to the Master, and accordingly the rule was made absolute. (g)

The statute requiring the appearance of the mortgagor, the court has no jurisdiction until appearance: but, if a recovery be had upon an undefended ejectment against a tenant of the mortgagor, the court will, in order to entitle the mortgagor to take the benefit of the statute, set aside the previous judgment, and permit the mortgagor to defend as landlord upon his paying the costs. (h)

And upon the second section of the same statute it hath been holden, that a reference to the Master must proceed upon an *admission* of the principal and interest due. But that, if upon a petition for a reference by the defendant, stating a less sum to be due than claimed in the bill, the defendant obtain an order, the reference under the statute is such an acquiescence that the defendant shall not afterwards, before the Master, insist that part of the mo-

(c) *Roe v. Soley*, 2 Blackst. 726.

(g) *Goodtitle v. Lonsdown*, 3 Anstr. 937.

(f) *Goodtitle v. Lonsdown*, 3 Anstr. 937.

(h) *Doe dem. Tubb v. Rowe*, 4 Taunt. 887.

ney was paid; and that a Master, in such case, ought not to enquire into the money due. In the same case it was observed, that the statements of the plaintiff and defendant differing, the order ought not to have been made. (*i*)

If a bill for foreclosure set forth any other claim against the defendant upon a distinct ground, an order cannot be granted under the statute, as the cause must go on as to the other matter. (*k*)

And it has been held that, upon a reference under the statute, the court has the same jurisdiction as if the cause were regularly brought to a hearing. It will, therefore, grant the defendant further time upon his paying up interest and costs. (*l*)

But a defendant, in order to stay proceedings at law, under an ejectment must apply before the plaintiff is entitled to take out execution. (*m*)

And a defendant, being in contempt, cannot upon motion have a reference under the statute. (*n*)

Where, upon an ejectment brought, the defendant wanted to stay proceedings, on payment of principal, interest, and costs, it appearing that he had agreed to sell the equity of redemption to the plaintiff, which contract he had repeatedly refused to complete, as it fell within the third section of the statute, the court refused the application. (*o*)

But upon a similar case, where the defendant had agreed to sell the equity of redemption to the plaintiff, it appearing upon affidavit that the plaintiff had never tendered a

(*i*) *Huson v. Hewson*, 4 Ves. 105. cited 7 Ves. 489.

(*k*) *Bastard v. Clarke*, 7 Ves. 489.

(*l*) *Wakerill v. Delight*, 9 Ves. 36.

(*m*) *Amis v. Lloyd*, 3 Ves. and Bea. 15.

(*n*) *Hewitt v. M'Cartney*, 13 Ves. 560.

(*o*) *Goodtitle dem. Tatum v. Pope*, 7 Term Rep. 185.

deed of conveyance to the defendant to be executed, and that no bill in equity was brought, the court, after taking time to consider of it, granted a motion for a reference to the Master. (*p*)

Where a decree has been made under the 7 Geo. 2. c. 20., it cannot afterwards be discharged on motion; for, by the words of the statute, such order or decree is to be binding to all intents and purposes, as if it had been made at or subsequent to the hearing of the suit. (*q*)

Although by the means which we have stated the mortgagee may recover possession of the lands, yet in no case will he be allowed to recover the past rents which have been received by the mortgagor. (*r*) His taking a scanty security or a leasehold security, whether for years or lives, is his own fault. (*s*)

And if a term be mortgaged, and a receiver appointed to keep down the interest of incumbrances, the mortgagee cannot, after the expiration of the term, have the money in the receiver's hands applied in discharge of his mortgage, but the surplus will be held to have been received for the benefit of the mortgagor; (*t*) for the court will not extend the order appointing the receiver for the benefit of the incumbrancers beyond what it is expressed to be.

But where a mortgagor is guilty of fraud in receiving the rents, he will have to account for them to the mortgagee. (*u*)

Another legal consequence of the mortgage, in which

(*p*) *Skinner v. Stacey*, 1 Wils. 80. and *Bea. 252. Colman v. Duke of St. Alban's*, 3 Ves. 25. *Drummond v. The Duke of St. Alban's*, 5 Ves. 433. *Swanst. 579.*

(*q*) *Cadle v. Fowle*, 1 Bro. C. C. 515.

(*r*) *Higgins v. York Buildings Company*, 2 Atk. 107. *Mead v. Lord Orrery*, 3 Atk. 244.

(*t*) *Gresley v. Adderley*, *Swanst. 573.*

(*u*) 3 Atk. 244.

(*s*) *Ex parte Wilson*, 2 Ves.



equity has not thought proper to interfere, is that the mortgagee of the whole term under a lease is answerable for the rents and covenants. (x) Lord Mansfield, in the case of *Eaton v. Jacques*, (y) had decided that this liability did not attach till the mortgagee took possession; and this was for a time taken for law: (z) but the principle of the decision was never liked (a) till in a late case its authority was completely over-ruled, with the unanimous consent of ten Judges; (b) and the old rule established. (c) Therefore, whether the mortgagee take possession or do not take possession, it is now immaterial; for he will be equally chargeable with the rents and covenants.

In order to guard against this liability to payment of rent and performance of covenants, the mortgage ought to be taken for a term short of the original lease, so as to leave a reversion in the mortgagor, who on account of this reversion, though it be for a day or two only, as is generally the case, will at law be compellable to save harmless the mortgagee from the rents and covenants to the original landlord, should the mortgagee take possession, and the original landlord distrain; and will, whether the mortgagee take possession or not, prevent the original lessor from maintaining an action of covenant against him. (d)

And if the mortgage of a lease be made by deposit, there should always be a memorandum taken of the intention to mortgage for a derivative term only; as other-

(x) *Pilkington v. Shaller*, 2 Vern. 500.

374.

(b) *Williams v. Bosanquet*, 1

(y) Doug. 438.

Bro. and Bing. 238. S. C. 3 Moor.

(z) *Gretton v. Diggles*, 4 Taunt. 500.

766. *Walker v. Reeves*, Doug.

(c) *Sparkes v. Smith*, 2 Vern.

441. note 1.

276. *Pilkington v. Shaller*, 2 Vern.

(a) See the arguments and judgment in *Williams v. Bosanquet*, 1

374.

Bro. and Bing. 238. S. C. 3 Moor.

(d) *Holford v. Hatch*, Doug.

183.

wise the mortgagee may be compelled by the original landlord to take a legal mortgage of the whole term, in order that he may charge him with covenant; and not only this, but as against the lessor the mortgagee must pay the costs of the assignment. (e).

In this place it may be proper to mention that in the case of ecclesiastical leases it is a matter of discretion whether the mortgagee will take a mortgage by an assignment of the whole interest of the mortgagor, or whether by an under-lease. If he prefers the former, he makes himself liable to the rent and covenants: but then he gains a considerable advantage by being able to renew without the assistance of the mortgagor. Besides which, by leaving a reversion in the mortgagor, he enables the mortgagor at any time to renew without his privity, (f) who may immediately, upon a renewal, assign over the legal estate to another person, and thereby deprive the mortgagee of the benefit of such renewal. But where the mortgagee takes possession of the original lease, as it is not likely that the College would renew without its being delivered over, this objection may not be supposed to be of much consequence.

A mortgagee of a ship cannot, in his own name, recover any of the earnings of the ship accrued due while the mortgagor is in possession. Thus, in *Chinnery v. Blackburne*, (g) a mortgagee of a ship, after having taken possession, brought an action for freightage, earned by the ship while he was not in possession. It was urged by Wood, who argued for the plaintiff, that the mortgagee of a ship in possession may sue for freight accrued after the mortgage, as a mortgagee of land, coming into possession, is entitled to the intermediate rents unpaid, growing due

(e) *Lucas v. Comerford*, 1 Ves. jun. 235. S. C. 3 Bro. C. C. 166.

(f) 4 Geo. 2. c. 28. s. 6.

(g) 1 H. Blackst. 117. note.

after the mortgage, though before he takes possession. To this it was answered, that in the principal case the contract was with a third person, not for the benefit of the plaintiff, who could not, therefore, recover in her own name; that it had no analogy to rent issuing out of land, which is incident to the reversion; that the cause of action arose on a personal contract, not on the ship itself; and that a mortgagee cannot recover rent received from the mortgagor. It was decided that the plaintiff, the mortgagee, had no right to recover, Lord Mansfield, C. J., saying "The justice of the case struck me forcibly at first, as between the mortgagor and mortgagee: but the mortgagor is no party; the action is brought after the mortgage, against a person who contracted with the mortgagor. This action must be founded on the idea that the mortgagor in possession is the servant and agent for the mortgagee, which is not the case. Till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expences, and he is to reap the profits." From this case, I think, it appears pretty plain that in all mortgages of ships there should be a power of attorney enabling the mortgagee to recover any part of the earnings of the ship, made in consequence of any contract with the mortgagor.

How far a mortgagee of a ship, not in possession, shall be liable for supplies and necessaries furnished to the ship, is a point which I conceive cannot be held to be completely settled. The courts of law, indeed, seem to have formed a very decided opinion on the subject; having, in a variety of cases, held that the question is entirely referrible to the privity of contract, so that if one contract with the mortgagor to supply a ship, the mortgagee not being in possession, he cannot afterwards come upon the mortgagee for a breach of the contract; for, though the registered owners are *primâ facie* liable, yet they may shew that the credit was not given to

them, and that they had no participation in the contract. And to hold to the contrary would be to put an end to the mortgages of ships. (*h*) The inconvenience of holding the registry of a mortgage so decided an evidence of ownership as that its effect cannot be explained away by the mortgagee, even as against a person contracting with the mortgagor may eventually decide the question in favour of the mortgagee. But certainly Lord Eldon has expressed a very strong opinion to the contrary. Thus, in *ex parte Machell*, (*i*) "these houses," (in which were included the mortgagees,) said his Lordship, "stand upon the face of the registry as the persons interested in the ship; and, putting out of consideration the fact that the credit was given to Williams and Co." (the mortgagors) "alone, *primâ facie* the persons upon the registry, are liable. It is said, that the name of Devaynes and Co." (the mortgagees) "was put upon the registry without their knowledge. It may be so; and yet it might be within their knowledge, in a sense making them liable as owners; as, if their agent was directed to take an effectual security, his duty required him to have their names upon the registry: and, if so, it would be very difficult to say they had not possession of the ship, the possession of some owners being the possession of all." According to these observations Lord Eldon held that the petitioner might prove his debt as against the estate of the mortgagees; at the same time observing that he would not refuse an issue, whether these persons, or any of them, are liable with any other persons, and whom, for the repairs of the ship; but that his opinion was that they were. And it may be observed, that upon this point

(*h*) *Martin v. Paxton*, reported *Jackson v. Vernon*, 1 H. Blackst. in *Holt on Shipping*, Vol. I. 354. 114.

*Annett v. Carstairs*, 3 Camp. 354. (*i*) 2 Ves. and Bea. 216.

*Twentyman v. Hart*, 1 Stark. 366.

Lord Kenyon appears to have been of the same opinion with Lord Eldon. (*k*) Considering, therefore, the contrariety of these decisions in the courts of law and equity, I think we may very safely conclude, as it was concluded before any of the above cited cases, except that of *Jackson v. Vernon*, had occurred; that the question whether a mortgagee shall be chargeable for the expences of the ship will most properly arise in the case of a contract made by the master in that character. And it may still be said, by way of advice and caution, that every person who takes a mortgage of a ship must, until these points shall have received a more solemn determination, consider it to be possible at least, that he may expose himself to a loss by the very act from which he expects a security. (*l*)

A mortgagee has such an interest in the land that he may interfere in all actions and suits respecting it. Thus, if it is an action at law, he may come in and be made a defendant together with the former defendant. (*m*) And if there be a suit in equity, he may come in and be examined *pro interesse suo*. (*n*) And if he advances money for the defending or prosecution of any suit, he will not be guilty of maintenance. (*o*)

By the 4 Geo. 2. c. 28. s. 2. it is enacted that every landlord who, by his lease hath a right of re-entry, in case of non-payment of rent, when half a year's rent is due and no sufficient distress is to be had, may recover without

(*k*) *Westerdell v. Dale*, 7 Term. Rep. 306.

(*l*) *Abbott on Shipping*, Part I. Chap. I. sect. 14. 1st and subsequent editions.

(*m*) *Doe dem. Tilyard v. Cooper*, 8 Term Rep. 645.

(*n*) *Fawcett v. Fothergill*, Dick.

19. *Cooper v. Thornton*, *ibid.* 72.

*Hamlyn v. Lee*, *ibid.* 94. *Bowles v. Parsons*, *ibid.* 142.

(*o*) *Br. Champerty*, pl. 6. 15. Hen. 7. 2. there cited. *Pow. on Mortgage*, 273. 15 Vin. 168. pl. 10. in margin.

any previous demand of rent; and a recovery so had shall be binding on all parties: but it is expressly provided that the act shall not extend to bar the right of mortgagees not in possession, so as such mortgagees do within six calendar months after judgment had and execution executed pay all arrears of rent, and all costs sustained by the lessor, and perform all the covenants on the lessee's part.

By the Irish act of Parliament 8 Geo. 1. c. 2. a similar provision is inserted for the benefit of mortgagees of estates in Ireland; only that the terms of it are more extensive, for that requires that the mortgagee should be served with a summons of the ejectment, and gives the mortgagee nine months to pay the rent. (*p*) The fifth section of the same statute makes this summons unnecessary where the mortgage deed, or assignment, is not registered within six months.

Upon this act it has been decided that the ninth months mean calendar months; (*q*) that a mortgagee, requiring relief against an ejectment, must make the mortgagor a party to his bill; (*r*) and that a mortgagee is entitled to a summons, if the lessor has notice of the mortgage, though it be not duly registered according to the fifth section. (*s*)

And notwithstanding that the English statute has not expressly provided for the case, a mortgagee may have relief against an ejectment, though the lessor after execution executed grants a lease to a third person who takes possession, and expends money in improvements. (*t*)

(*p*) This statute allows but six months to the *lessee* to pay. See it stated 2 Sch. and Lef. 521. 1 Ball and Beat. 35. *in notis*.

(*q*) Biddulph v. St. John, 2 Scho. and Lef. 521.

(*r*) Adams v. St. Leger, 1 Ball and Beat. 181.

(*s*) Biddulph v. St. John, 2 Sho. and Lef. 532.

(*t*) Doe dem. Whitfield v. Roe, 3 Taunt. 492.

But the statute having provided for cases where the lessor has a power to re-enter only, and its intention being to do away with the formalities of a legal demand of rent, which was requisite, in order to entitle the lessor to re-enter ; (u) the cases in which the lease is *ipso facto* void by non-payment of rent, or non-performance of any of the covenants or conditions, are left as they were at common law. Now a lease for years with a condition that if the rent is unpaid, or any other condition or covenant unperformed, that the lease shall *cease and be void*, in contradiction to a power that the lessor may re-enter, will cease *ipso facto* on non-performance of the condition ; and no acceptance of rent by the lessor afterwards, or continuance of possession by the lessee, will confirm his estate. (x) Hence, upon a mortgage of a lease with such a condition, the mortgagee must in some way provide that his estate be not liable to be defeated by the negligence of the mortgagor. This may be effected in two ways :—1st. Either by the mortgagee's taking possession of the estate, so as to be enabled out of the profits to pay the rent to the lessor, and so save a forfeiture ; or, 2dly, By a mode which is applicable to every case where the security is precarious, or likely to be attended with trouble to the mortgagee, viz. by conveying the estate to a trustee upon trust to sell as mentioned in the first Chapter. All the crown leases are made with a proviso that on non-payment the estate shall *cease and be void*. But, by an especial statute, 21 Jac. 1. c. 25. made for that purpose, no advantage will be taken of the forfeiture or non-payment, if the rent be paid previously to any proceeding to recover.

(u) Serjeant Williams' note, 1 Com. 136. *Mulcarry v. Eyres*, Saund. 287. Cro. Car. 512. *Sir Moyle Finch v.*

(x) Co. Lit. 215. a. Shep. Touch. Throckmorton, Cro. Eliz. 220. 136. 5th ed. 3. Co. 64. b. Plow.

A person accepting a mortgage will be prevented from questioning the title of the mortgagor. Therefore, in ejectment, where the defence set up was, that the mortgagor claimed under a lease from the crown for a term, which by the 1 Ann. st. 2. c. 7. was void, it was not allowed. (y) And the same principle, it seems, will extend to the assignee of a mortgage. (z) In a case (a) in Keble, indeed, it is said, *per Curiam*, that the indenture of mortgage was no estoppel, to say in an action of covenant that the defendant had no estate, though in debt for rent it is. But the case is entered with an adjournatur; and *Parker v. Manning*, (b) which is a case within the like reasoning, is contrariwise.

A mortgagee should always stipulate for the possession of the title deeds, or the mortgage deed should contain a grant of them. Where a purchaser of part of an estate took an assignment of a mortgage upon the residue, upon which occasion the title deeds were delivered over to him, and afterwards assigned the mortgage, but the deed of assignment by him contained no grant of the title deeds, upon an action of trover brought by the assignee to recover the deeds, Lord Kenyon held that, to entitle the plaintiff to recover, he should have a better right to the deeds than the defendant, but that in the assignment to him there was no grant of them, and that he could not recover. (c)

Under the usual provisions enabling a mortgagee to sell and give receipts for the purchase money, a mort-

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| (y) Doe dem. Biddle v. Abrahams, 1 Stark. 305. And see Blake v. Foster, 8 Term Rep. 487. | (a) Cordinglee v. England, 3 Keb. 712. 54. |
| Wood v. Day, 1 Moo. 389.   | (b) 7 Term Rep. 537.                       |
| (z) Barwick v. Thompson, 7 Term. Rep. 488.   | (c) Yea v. Field, 2 Term Rep.              |



gagee may sell and enforce a performance without the joining of the mortgagor. (d)

The rule of law, which says that a lessor shall not be bound to rebuild, though he may have received the value of the premises by insurance, for the insurance is nothing to the tenant, (e) seeming to extend to the case of a mortgagee wherever houses become the subject of a mortgage, if the property is otherwise insufficient to cover the mortgage, it is constantly the practice to insert covenants on the part of the mortgagor, that he will at all times during the continuance of the security insure the premises, and that he will, upon the making or renewing of every policy of insurance, assign the benefit of it to the mortgagee.

Where a mortgagee joins in granting a lease of the mortgaged premises, the covenants on the part of the lessee should be entered into with him also; for where the covenants are entered into with the mortgagor only, the assignee of the mortgagee cannot maintain an action of covenant upon them, they being collateral to the interest of the mortgagee. (f) But if the mortgagee be in possession on a forfeited mortgage, the rent may be reserved, and the covenants entered into with him at once. And the same objection to the mortgagor's bringing an action of covenant will not lie; for, upon payment of the money and reconveyance of the estate, the mortgagor will be an assignee within the 32 Hen. 8. c. 34. But in almost every case where an estate is in mortgage, in order to make an effectual lease, it is necessary that both the mortgagor and the mortgagee should be parties.

(d) *Corder v. Morgan*, 18 Ves. 344. *Clay v. Sharpe*, in note there. (f) *Webb v. Russell*, 3 Term Rep. 393. But in such case the

(e) 1 Term Rep. 312. Serjeant mortgagor might, see *post*, Chap. Williams' note, 2 Saund. 422. Mortgagor.

As a mortgage of a copyhold is intended only to be a pledge, it is unreasonable that the mortgagee should pay a fine. The admission, therefore, of the mortgagee, if the surrender be made in court, is usually delayed. Or, if the surrender be made out of court, it is frequently suffered to become void for want of a timely presentment when a new surrender is taken. (g)

In case the money be paid within the time prescribed by the condition, whether the mortgagee has been admitted or not, the surrender becomes void, and the surrenderor becomes possessed of his former estate, and is in *statu quo prius*, without any re-admission or fine. (h) Upon payment of the money within the time the mortgagee should acknowledge satisfaction, which acknowledgment is generally written in the margin of the roll, immediately against the surrender, and signed by the mortgagee. (i) But if the mortgagee be admitted, and the condition broken, the estate of the mortgagee becomes absolute; and if the money be afterwards paid, there must be a resurrender by the mortgagee, and a regular admission of the mortgagor. (k)

Whether the mortgagee be compellable to be admitted depends entirely upon the custom of the manor. If the custom be silent, it seems that the lord has no means of compelling the surrenderee to come in and be admitted. (l) But where he can, by custom, compel a surrenderee to be admitted, a court of equity will not relieve in the case of

(g) *Fawcett v. Lowther*, 2 Ves. 302. 1 *Watk. on Copyh.* 117. 1st edition.

(h) 1 *Watk. on Copyh.* 117. 1st edition.

(i) 1 *Watk. on Copyh.* 120. 1st edition.

(k) 1 *Watk. on Copyh.* 121. 1st edition. *Gilb. Ten.* 276.

(l) *Cha. Prec.* 573. 1 *Watk. on*

*Copyh.* 237. note. By the general custom of copyholds, a surrender ought to be presented at the next court, as appears from *Lord Coke*; but there are several copyholds where the tenant need not come under three courts; and by the special custom of a manor the surrender may be presented at *any* subsequent court, 2 *Ves.* 302. 602.

a surrender by way of mortgage. In the case which decided this, the condition of the surrender was to repay in six months, at the end of which time the money not being paid, the mortgagee desired that the old surrender might be taken up and a new one granted, the court said, that, if the mortgagee thought fit, it would direct an issue at law to try whether the lord was, by the custom of the manor, bound to renew the surrender, or to accept the second surrender. (*m*) And this is not at all inconsistent with law; for a different custom as to unconditional surrenders, and as to surrenders by way of mortgage, may well stand together. (*n*)

A mortgagee of copyholds, in order to save a forfeiture, may pull down ruinous houses, and build better in their stead. (*o*)

Under the 9 Geo. 1. c. 7. "either a mortgagor or mortgagee may gain a settlement according to circumstances. One of those circumstances is possession; and upon possession all the questions have turned."—Per Buller, J. (*p*) To which we may add, that the possession must be for forty days; (*q*) and that, in order to entitle the mortgagee to gain a settlement by possession, it is further requisite that the mortgage be for the sum of thirty pounds at least. (*r*)

By the statute 9 Ann. c. 5. s. 4. a mortgagee is qualified to sit in parliament, if he has been in possession for seven years before the time of his election.

And by the act for regulating elections of members

(*m*) *Tredway v. Fotherley*, 2 771.

Vern. 367.; and see 8 Ves. 384.

(*q*) 13 and 14 Car. 2. c. 12. s. 1.

(*n*) Per Lord Chancellor, in *Fawcett v. Lowther*, 2 Ves. 302.

(*r*) See the 9 Geo. 1. c. 7. s. 5.

(*o*) 4 Ves. 480.

and Ashurst's Judgment in *The King v. The Inhabitants of Mat-*

(*p*) In *the King v. The Inhabitants of Catherington*, 3 Term Rep.

*tingley*, 2 Term Rep. 15.

to serve in parliament, a mortgagee in possession may vote. (s)

We have hitherto been treating of the estate of the mortgagee, chiefly as it may be regarded in a Court of law, independent of, and without the interference of equity; we come now to look at his interest more particularly in a Court of Equity.

And here we shall find that equity, in all its decisions, is guided by its primary consideration, *viz.* that the mortgage is a transaction of borrowing and lending. And, therefore, as on the one hand, it will do every thing to secure to the mortgagee his money; so, on the other, it will take care that the legal interest of the mortgagee shall not affect or prejudice the mortgagor otherwise, or further, than his claim for principal, interest and costs.

As a purchaser, so a mortgagee, is entitled to the protection of equity; therefore the defective execution of a power will be supplied in favour of a mortgagee. (t)

So a mortgagee of copyholds will be relieved against a defective conveyance, (u) or a surrender become void for want of timely presentment. (x)

And a mortgagee is in equity a purchaser *pro tanto* within the statute of the 27 Eliz. c. 4. for setting aside voluntary conveyances in favour of purchasers. And his having had notice of the prior voluntary conveyance will not counteract this. (y) Therefore where a man, who had mortgaged his estate, married, and after marriage made a settlement of the mortgaged estate upon his wife, which was

(s) 7 and 8 Will. 3. c. 25. s. 7. 3 Term Rep. 772.

(t) Fothergill v. Fothergill, 2 Freem. 257.

(u) Spencer v. Boyes, 4 Ves. 370.

(x) Taylor v. Wheeler, 2 Vern. 564.

(y) Chapman v. Emery, Cowp. 278. Cowp. 713. White v. Hussey, Cha. Prec. 13. Saunders v. Dehew, 2 Vern. 271., at the end.

Rand v. Cartwright, 1 Cha. Ca. 59. Martin v. Seamore, 1 Cha. Ca. 170.

Amb. 288, 289. Warwick v. War-

recited to be in consideration of a portion paid, and then mortgaged it a second time; he dying, she brought her bill to be let into her jointure on payment of one third of the money due on the first mortgage, without being obliged to redeem the second mortgagee, whom she charged as having had notice of the jointure. It appeared that the second mortgagee had notice of the jointure at the time of the mortgage; that there were no articles previous to the settlement; and no money was proved to be paid after marriage. And it was decreed at the Rolls that she should not be let into her jointure, without redeeming both; which decree was affirmed on appeal to the chancellor. (z)

The third section of the statute 27 Eliz. c. 4. enacts that every person party or privy to a fraudulent conveyance, who shall justify the same to be made *bonâ fide*, and for valuable consideration to the disturbance and hindrance of a lawful purchaser, shall forfeit one year's value of the lands so purchased, or charged, to be divided between the queen and the party grieved; and, being thereof convicted, shall suffer half a year's imprisonment without bail. Upon this section of the statute it has been resolved, 1st. That a mortgagee is a sufficient purchaser within this statute; and, 2dly. That one entire year's profit shall be forfeited without apportionment on a mortgage, as well as on an absolute sale; so on a lease, or a petty annuity made by fraud. (a)

If a mortgagee is not in possession, the Court will grant an injunction to prevent the mortgagor from cutting underwood, except in an husbandlike manner at the usual seasons, and of the usual growth. (b)

wick, 3 Atk. 291. *Doe v. Manning*, (a) *Poulton v. Wiseman*, Noy.  
9 East. 59. *Cormick v. Trapaud*, 105.

6 Dow. 60. (b) Per Eldon, Chancellor, 8

(z) *Gardiner v. Painter*, Sel. Cha. Ves. 105. 3 Atk. 210. 723.

Ca. 65.

And where there was a mortgage comprizing underwoods, the mortgagor becoming bankrupt, the Court granted an injunction to restrain cutting the underwood; for a mortgagee is entitled to the estate in the plight in which it was at the date of the bankruptcy, and to prove for the rest of the debt. (c)

The Court will never compel a mortgagee to part with his security till he has been repaid his money; and, consequently, a mortgagee may refuse to give up, or even to shew, his deeds till that time. (d)

So a mortgagee of a moiety of an estate having the title deeds in his possession shall not be obliged to produce them for the inspection of the person entitled to the other moiety; for a mortgagee has no right to shew his mortgagor's title. (e) Though as between two persons respectively, admitting themselves to be tenants in common with each other, there is no doubt that the Court will order the production of title deeds in the hands of either for the other's inspection. (f)

But, upon an application and notice to be paid off, a fair mortgagee will not refuse an inspection of the deeds in his hands. (g)

But, if a mortgagee advance money on the security of an estate, with notice of a defect in the title, he cannot, as against the person entitled to the estate, retain the title deeds. (h) Though if the mortgage deed contain a covenant for payment of the money, the Court will not take that particular deed from him, because under the covenant the mortgagee may recover damages. (i)

(c) *Hampton v. Hodges*, 8 Ves. 105.

(d) *Postlethwaite v. Blythe*, 3 Mad. 242. 244. 2 Ves. 450. 2 Atk. 332.

(e) *Lambert v. Rogers*, 2 Mer. 489

(f) 2 Mer. 490.

(g) Per Lord Hardwicke, 2 Atk.

332.

(h) *Opie v. Godolphin*, Cha. Prec. 548.

(i) *Opie v. Godolphin*, Cha. Prec. 543.

So, it has been held that where the mortgage of a ship is void for want of due registration, still the mortgagee may proceed on the personal covenant contained in it for repayment. (*j*)

Where an heir at law, supposing himself entitled to two separate estates, mortgages one, and afterwards discovering that he was put to election by his ancestor's will, elects to take the other, the title of the mortgagee nevertheless shall not be impeached. (*k*)

We have already seen that a mortgagee having once elected to prove, under a commission of bankruptcy, cannot afterwards resort to his security. Upon the same principle it might be held that a mortgagee coming in under a composition deed had made his election: but as the intention of these deeds is to prevent the taking out a commission of bankrupt, in order to effectuate which it is necessary that all the creditors should join, (*l*) it has become usual to insert in all deeds, making provision for creditors, an express declaration that creditors holding a special security shall not be prejudiced by joining.

A legatee taking payment by a mortgage, with an understanding that he might, at a future period, relinquish it, and afterwards resorting to the fund provided by the testator for payment of his legacies, will reduce himself to the condition of a mere legatee. So that if the mortgage bore five per cent interest, he may eventually, by this means, become entitled only to four per cent interest, and have to account for what he has received in the mean time. (*m*)

Where a conveyance is set aside as usurious, and so

(*j*) *Kerrison v. Cole*, 8 East. 65.

231. and see *Mouys v. Leake*, 8  
Term Rep. 411. 11 Ves. 629.

(*l*) *Bamford v. Baron*, 2 Term  
Rep. 594. n.

(*k*) *Rumbold v. Rumbold*, 3 Ves.

(*m*) *Sitwell v. Bernard*, 6 Ves. 520.

held a mortgage only, the grantee will be entitled to all monies expended by him in valuable and lasting improvements. (*n*)

A mortgagee, like a purchaser, takes the estate subject to all the incumbrances to which the estate was liable in the hands of his grantor. (*o*) And if the mortgagor has done any act which amounts to a forfeiture, the mortgagee will lose his security. As if lands be limited to A. and M. his wife, remainder to their first and other sons successively in tail; and after a son born A. and M. by lease and release and fine make a mortgage to I. S.; this is a forfeiture, and I. S. can have no relief, (*p*) unless perhaps on the covenant or bond.

If a leasehold estate be mortgaged, and there is no covenant on the part of the mortgagor to renew, the mortgagee cannot compel him to do it, but must pay the expence of renewing, and then reimburse himself by adding it to the principal of his mortgage, and it shall carry interest. (*q*)

But if the mortgagor obtain a renewal, or a grant of a fresh term in remainder, without the privity of the mortgagee, such fresh term will be considered a trust for the mortgagee. And though the mortgaged lease is expired by efflux of time, still the fresh term shall be assigned to the mortgagee to hold till the debt be satisfied. (*r*)

So where the assignee of a term mortgaged. The title afterwards proving defective the owner of the estate out of compassion to the assignee, who had built upon it, demised for a long term to trustees for his wife, he being

(*n*) Browne v. O'Dea, 1 Scho. & Lef. 120.

(*o*) Opie v. Godolphin, Cha. Prec. 548.

(*p*) Whetstone v. Sainsbury, Cha. Prec. 591.

(*q*) Lucam v. Mertins, 1 Wils. 34. S. C. 3 Atk. 4.

(*r*) Luckin v. Rushworth, 2 Cha. Rep. 113. Finch Rep. 392. 6

Mod. 57.



run away. The Master of the Rolls looking upon the estate made by the owner as a graft into the original stock, and the benefit of it above the rent reserved as arising in consideration of the former title, decreed the trustees to make a new mortgage to the mortgagee. (s)

On the other hand, if the mortgagee renew, the renewed term will be like the former subject to the equity of redemption in the mortgagor; and the extent of the mortgagee's interest therein will be his claim for principal, interest, and expences of renewal, with interest. (t)

In Ireland, where the lessor brings an ejectment for non-payment of rent, the lessee has six months allowed him for recovering his lease, on putting the lessor in *statu quo*: but if the lease be in mortgage, the mortgagee has nine months allowed to him for that purpose. (u) And it has frequently become a question, whether the mortgagee by redeeming the lease after the expiration of the six months, and before the expiration of the nine months, becomes a trustee for the mortgagor. I am not aware of this question having been yet determined: but, in a case which arose in 1809, the present Chancellor of Ireland declared that he had always said he would not determine that question; but whenever it might arise, he would refer it to the Judges for their opinion, who were more competent to decide on the construction of an Irish act of Parliament. (x)

But if after a lease ended the mortgagor absolutely refuse to renew, and it appears that a mortgagee has ob-

(s) *Seabourne v. Powel*, 2 Vern. Ball and Bea. 37. note.

11.

(u) 8 Geo. 1. c. 2. Irish Stat.

(t) *Manlove v. Bale*, 2 Vern.

1 Ball and Beat. 35 note.

84. *Rakestraw v. Brewer*, Sel. Cha.

(x) *Adams v. St. Leger*, 1 Ball

Ca. 55. S. C. 2 P. Wms. 511. Mos.

and Beat. 181. And see *Nesbitt v.*

189. *Lee v. Vernon*, 7 Bro. P. C.

*Tredennick*, *ibid.* 29.

432. *Fitzgerald v. Ranisford*, 1

tained a new lease without any fraud or contrivance on his part, such new lease will not be subject to redemption, or be a trust for the mortgagor. (*y*)

Lord Hardwicke was of opinion that a court of equity would not compel a mortgagee of leaseholds for lives to surrender, in order to enable the mortgagor to renew ; for he might have an objection to the lives proposed, and insist that the lives in being were better, or oblige the tenant, the mortgagor, to propose other lives, or redeem him : but said, that if it had been a chattel interest and lease for years only, it would have been otherwise ; for then, upon surrendering the old, in which there was only a remainder of a term to come, a new and longer term would have been granted ; which was an advantage to the mortgagee, as being a better security. (*z*)

There are various other instances in which a mortgagee till foreclosure is considered only as a trustee for the mortgagor.

Thus the mortgagee of an estate to which an advowson is appendant, or of a naked advowson, having the legal estate, has consequently the right to present at law : but, since a presentation is gratuitous, and the mortgagee cannot account for any benefits from it, a court of equity will compel the mortgagee to present the nominee of the mortgagor. (*a*)

And the rule would be the same, though the mortgage be of a limited interest in a naked advowson, and the deed contain a covenant that on avoidance the mortgagee should present, for that would be a stipulation for something more than principal and interest. (*b*)

(*y*) *Nesbitt v. Tredennick*, 1 by, Stra. 403. S. C. Com. 343. Ball and Beat. 29. For. 145. *Mackensie v. Robinson*,

(*z*) In *Winne v. Bampton*, 3 Atk. 3 Atk. 559. *Dymoke v. Hobart*, 1 Bro. P. C. 81.

(*a*) Com. R. 609. *Gally v. Sel-*

(*b*) See *Gardiner v. Griffith*, 2

If the mortgagee should present without the consent of the mortgagor, the Court of Chancery would make an order for the mortgagee to revoke and countermand his presentation. (c) And if he should bring a *quare impedit* to compel admission, it would decree an injunction to stay proceedings thereupon. (d) But, in order to obtain this relief, it is necessary, as it seems, that the mortgagor should offer to redeem; for he cannot insist on having the benefit of the presentation, and then leave the mortgagee to his security, as by this means the mortgagee might never be paid. (e) And further it is necessary that the time limited for a *quare impedit* be observed; for, if the mortgagor do not bring his bill within six calendar months after the death of the last incumbent, the presentation made by the mortgagee must stand. Though Lord Chancellor King, in the spirit of the statute, (f) declared that, if a *quare impedit* were brought within the six months, and the bill preferred after the six months, the court might give directions in aid of the *quare impedit*. (g)

If the mortgagor commit simony, the mortgagee cannot, as against the crown, present. (h)

After foreclosure, or when the mortgage has become irredeemable, it follows, as a matter of course, that the mortgagee may make an absolute presentation. (i)

Lord Hardwicke, in a case before him, said that the mortgagee of an advowson, instead of bringing a bill of

P. Wms. 404. and Lord Hard-

wicke's comment thereon, 3 Atk.

559, 560. 2 Fonbl. Treat. Eq. 257.

(c) Jory v. Cox, Cha. Prec. 71.

(d) Amhurst v. Dawling, 2 Vern. 401. Dyer v. Lord Craven, Dick. 662.

(e) See Dyer v. Craven, Dick. 662. 2 Vern. 401. Cha. Prec. 71.

(f) Westm. 2. 13 Edw. 1. st. 1.

c. 5.

(g) Gardiner v. Griffith, 2 P.

Wms. 404. affirmed D. P. 3 Atk.

559.

(h) Attorney General v. Hes-  
keth, 2 Vern. 549. S. C. Cha. Pre.  
214.

(i) 3 Atk. 458. note. Dyer v.  
Craven, Dick. 662.

foreclosure should have prayed a sale; (*k*) which, we may observe, must have been said with a view to influence the mortgagee no further than will arise from the consideration, that a sale may be decreed immediately; but a decree of foreclosure always gives a day to the mortgagor to redeem, which time may afterwards be enlarged; so that on a bill of foreclosure there is a greater chance of the incumbent dying during the continuance of the mortgage.

How far the law of escheat shall apply to mortgages, it is not yet settled. The general principle of the cases which have been decided upon trusts might almost be said to be applicable, if it were not that a trust and a power of redemption have in this particular been sometimes attempted to be distinguished. But as there are dicta upon the subject, which may eventually influence the law, it may not be improper to notice them.

In the celebrated case of *Burgess v. Wheate*, (*l*) where the case arose in argument, the Lord Keeper, Northington, and Sir Thomas Clarke, M. R., both expressed themselves. The former thus:—"It was said, if a mortgagor die without heir, shall the mortgagee hold the land free? I answer, shall it escheat to the crown? No; because, in that case, the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor, I shall not trouble myself about. I think the crown has not an equity on which to sue a *subpœna*." (*m*) As between the mortgagee and lord claiming by escheat, Sir Thomas Clarke agrees with the Lord Keeper; as between the mortgagee and executor, he is more particular. "Then it was

(*k*) *Mackensie v. Robinson*, 3 Atk. 559.

(*m*) This is as Blackstone states it; in *Eden*, Vol. I. pag. 255, 256.

(*l*) 1 Blackst. 123. 1 *Eden*, it is much fuller.  
177.

said, suppose mortgagor die without heir, shall the mortgagee hold the estate absolutely? And if he demands his money too against the personal representative, shall he have both land and money? If the mortgagor die without heir or creditor, I see no inconvenience if the mortgagee held it absolutely. In the case of a forfeiture for treason, it is certain the crown might redeem, as in Sir Salathiel Lovel's case. (n) And as to the supposition, that the mortgagee may demand his money too, that must be where the mortgagor dies without heir; therefore, the demand must be against the personal representative. I think the court would compel the mortgagee to reconvey; not to the lord by escheat, but to the personal representative; and, if necessary, would consider the estate reconveyed as coming in lieu of the personalty, and as assets to answer even simple contract creditors. Under these circumstances, where is the great inconvenience?"

It has not yet been expressly decided whether a mortgage is redeemable in the hands of the crown; nor is the question likely to arise; since the statutes of the 39 and 40 Geo. 3. c. 88. s. 12. and 47 Geo. 3. sess. 2. c. 24. enable the crown to make a grant of all lands escheated or forfeited to it, *ut de jure coronæ*, or in right of the duchy of Lancaster to any trustees or otherwise. (o) But the expressions certainly have been, that a mortgage in the hands of the crown is not redeemable; and that the crown cannot be compelled to convey, though the equity against the King has been distinctly recognized. Lord Hale seems to have been aware of the importance of the question, and at the same time to have formed a settled opinion upon it. In *Pawlett v. The Attorney General*, (p) he notices a case

(n) 1 Salk. 85.

Lef. 177. case there cited by Lord

(o) See *Smith v. Bicknell*, cited Redesdale.

3 Ves. and Bea. 51. 1 Scho. and (p) Hard. 465.

of the Earl of Cleveland, before the House of Lords, wherein it was made a question—1st. Whether or no there be a right of redemption against the King? And, 2dly. If there be, what remedy must be taken? To the first of which he states himself to have answered, that as he took the law to be, in natural justice, redemption of a mortgage did lie against the King. But to the other question he made no answer, because he took it to be a point of great importance. But his opinion was, that the King could not be compelled to reconvey, but that an *amoveas manum* only lay; saying that this was all that could be done, if the trustee forfeited the estate. In the principal case of *Pawlett v. The Attorney General*, wherein the merits of the question did not arise, he holds to these opinions. The result of Hale's opinion, therefore, was that there was an equity, but not a right, against the crown; that the crown would grant the lands to the mortgagor, (though he was uncertain in what manner the application for a grant must be made,) but was not compellable thereto. (q) And the conclusions, as here drawn, seem consonant to those drawn from the same case by the Lord Keeper Northington. (r) Indeed, in *Pawlett v. The Attorney General*, the Chief Baron having distinguished a trust from a mortgage, saying that a mortgage was not merely a trust, but a title in equity; and a power of redemption so inherent as to bind all persons, in the post or otherwise, goes on to observe, "that although by escheat (generally) the tenure is extinguished, that would be nothing to the purpose, because the party might be recompensed for that by the court, by a decree for rent, or part of the land itself, or some other satisfaction." We may close our observations upon this subject by remark-

(q) See 6 Price, 463. *Rex v.* (r) 1 Blackst. 184, 1 Eden, 255, Hollier, 2 Price, 394. 256.

ing that it is doubtful whether in the case of a trust the lord by escheat is liable to execute the trust: but the better opinion is that he is not. (s)

Although a mortgagee need not insure the mortgagor's interest at all, or if he does, need not insure beyond what will be sufficient to cover his own interest; yet, if his mortgagor be abroad, and at the same time that he receives bills of lading he receives also orders to insure, his acceptance of the security will be construed an acceptance of the trust, and he must insure the mortgagor's equitable interest in the property also. (t)

But a mortgagee must not go beyond his authority. As where A. had a long exchequer annuity for ninety-nine years, which was settled on the husband for life, remainder to the wife for life, remainder for provision of children, and had liberty, by decree of the court, to borrow three hundred pounds upon it, which was done, and the security placed in B., the lender's hands. B. subscribed it into the South Sea stock, in 1720. A. brought his bill for reconveyance; and it was held that B. had it for a particular purpose, and had no authority to subscribe; so decreed to account for the profits, and to convey on payment of principal, interest, and costs. (u)

A mortgagee shall be allowed nothing for his trouble in receiving rents, and a covenant that he shall is not good. (v) Nor can he stipulate for, or charge, any thing by way of commission. (x) On West India mortgages, indeed, commission has sometimes been allowed: but that is with reference to the law of the particular island in

(s) 1 Blackst. 178. 1 Stra. 454. Cha. Ca. 51.

Geary v. Bearcroft, Carter, 67. as (v) French v. Baron, 2 Atk. explained, 2 Fonbl. Treat. on Eq. 120. Godfrey v. Watson, 3 Atk. 169. note. 3 Cru. Dig. 496. *et seq.* 518. Bonithon v. Hockmore, 1

(t) Smith v. Lascelles, 2 Term Vern. 316. Langstaff v. Fenwick, Rep. 187. 10 Ves. 405.

(u) Thomas v. Puddlesbury, Sel. (x) 9 Ves. 271.

which the mortgaged property lies allowing it, and will cease immediately on the mortgagee's quitting the island. (*y*) But the mortgagee may stipulate for another person being the receiver, or himself appoint a bailiff or receiver; (*z*) in which case he will be allowed the expence of such bailiff or receiver. (*a*) The general principle which governs these cases is, that the mortgagee shall be allowed nothing beyond his principal and interest. (*b*)

On a mortgagee's appointing a receiver himself, it may not be amiss to recollect the rule laid down, with respect to trustees, that if a trustee have power to appoint an agent, he will not be answerable if he appoints one solvent at the time of appointment: but if he has no such power, he will be liable for his agent at all events. (*c*)

The relationship of a mortgagor and mortgagee, however, will not prevent a mortgagee from purchasing the equity of redemption. In a variety of instances, where this has happened, the transactions on that account have never been questioned; (*d*) so that the tendency of a contrary doctrine would at this day be very dangerous. (*e*) The cases in which it has seemingly been impugned are most of them distinguishable as connected with other circumstances, as, either the mortgagee being a trustee

(*y*) 9 Ves. 268. 272, 273.

365.

(*z*) 9 Ves. 272. 2 Scho. and Lef. 301.

(*a*) *Davis v. Dendy*, 3 Mad. 170. 2 Scho. and Lef. 301. and see the case in note (*u*) ante.

(*b*) *Webb v. Rorke*, 2 Scho. and Lef. 218.

(*c*) 12 Mod. 560. In *Sutton the Marshal's case*. *Rowth v. Howell*, 3 Ves. 565. and the *Earl of Plymouth's case*, there cited, 2 Fonbl. 180. *Rigge v. Bowater*, 3 Bro C. C.

(*d*) *Goodtitle v. Pope*, 7 Term Rep. 185. *Skinner v. Stacey*, 1 Wils. 80. Ex parte *Marsh*, 1 Mad. 148. and the case in *Hil. T. 1806*. stated by the Reporter in the note there. And see and consider the two first lines of pag. 35. of 2 Cha. Ca. in *Jason v. Eyres*; and *Hickes v. Cooke*, 4 Dow. 16.

(*e*) *Sugd. on Vend. and Pur.* 483, 484. 4th edit.



for sale ; (f) or having taken an undue advantage of his situation ; (g) or having agreed to forbear calling in his money, which would make the contract usurious. (h)

But although a mortgagee may, without imputation, contract for the purchase or release of the equity of redemption, no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises, (such as a lease,) where the relationship of mortgagor and mortgagee still continues, will be allowed to stand, if impeached within a reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction (i)

If a mortgage be made in fee, and the mortgagee, having contracted to purchase the equity of redemption, obtain a release from the mortgagor of all his interest in the land, it will be considered a sufficient conveyance. But if a mortgage be made by a lease for five hundred years ; and the mortgagee, designing that the mortgagor should release unto him his equity of redemption to make the term absolute, obtain a release from the mortgagor, whereby he releases all his right, title, and interest, in the land ; such release will extinguish the term for years, and turn it into an estate for life ; for no estate being expressed, it is intended an estate for life. (k) A direction to the tenants to attorn will not amount to a release of the equity of redemption. (l)

A mortgagee in possession is not obliged to lay out money any farther than to keep the estate in necessary repair. (m) Nor is he obliged to leave the premises in

(f) *Downes v. Grazebrook*, 3 Mer. 200.

(g) *Gubbins v. Creed*, 2 Scho. and Lef. 214. 218. *Webb v. Rorke*, *ibid.* 661.

(h) 2 Scho. and Lef. 218.

(i) *Hickes v. Cooke*, 4 Dow. 16. 28.

(k) *Anon.* 1 Freem. 474. pl. 650.

(l) *Franklyn and Fern, Barnard.* Cha. Ca. 30.

(m) 3 Atk. 518.

as good repair as he found them, particularly if he has been in possession a long while (*n*).

A mortgagee at law may commit waste ; and the mortgagor will be without remedy, unless there is an express covenant not to commit waste. (*o*) But in equity a mortgagee will be prevented from committing waste, unless the security appears to be scanty or defective. And where a mortgagee cuts down timber, he must apply it to ease the estate ; first the interest, and then the principal of his mortgage. (*p*)

So a mortgagee before foreclosure of the equity of redemption cannot make a lease for years, so as to bind the mortgagor, unless to avoid an apparent loss, and merely in necessity ; (*q*) and then only at improved and rack rent. (*r*)

A fine by mortgagee in possession, and non-claim thereon for five years, will not bar the equity of redemption. (*s*)

But this is merely an equitable doctrine ; and, therefore, where a mortgagor is guilty of fraud in obtaining an estate, and then mortgages it, which mortgage afterwards comes to the person who would have been entitled to the estate, in case such estate had not been fraudulently obtained ; and the assignee levies a fine, upon which there passes five years' non-claim, the court will not relieve against the effects of the fine. As in *Packington v. Barrow*, (*t*) where A. married a young heiress, and by

(*n*) *Russell v. Smithies*, 1 Anstr. 96.

(*o*) *Evans v. Thomas*, Cro. Jac. 172.

(*p*) *Witherington v. Banks*, Sel. Cha. Ca. temp. King, 30. *Hanson v. Danby*, 2 Vern. 392. *Farrant v. Lovel*, 3 Atk. 723.

(*q*) *Hungerford v. Clay*, 9 Mod. 1.

(*r*) *Welden v. Rallison*, 1 Cha. Rep. 172.

(*s*) *Welden v. Dux Ebor'*, 1 Vern. 132. *Lingard v. Griffin*, 2 Vern. 189. seemingly *contra* : but see the note to *Raithby's* edit. and *Willis v. Shorral*, 1 Atk. 474.

(*t*) *Cha. Prec.* 216.

indirect means procured her to levy a fine of her inheritance, while she was under age, and A.'s father was one of the commissioners who took the fine, and the uses of the fine were declared to be to her and her husband and the heirs of their two bodies, remainder to the heirs of the survivor. The wife died under age, and without issue; and the husband survived her, and made a mortgage. The heir of the wife purchased the mortgage, got into possession, levied a fine, and five years passed; and the deed declaring the uses of the fine levied by A. and his wife was lost. Upon a bill brought by the heir of A. for a discovery of the deed and redemption, the defendant pleaded the ill practices in obtaining the fine, and also his own fine and non-claim, and also that there was no such deed as the plaintiff sought a discovery of; or, if there was, it was obtained by fraud. And, *per Curiam*, the defendant insists there was no such deed; or, if there was, it was obtained by mal-practice, and also on a fine and non-claim; and the father, in taking the fine from his daughter-in-law, could not have been assisted here, and the plaintiffs claim under him. All titles at law, that are not directly against conscience, shall be assisted here to a redemption; and if there were only a blemish in the title, so should the plaintiffs: but I cannot get over the fine and non-claim; the plea is good, dismiss the bill.

Nor will a common recovery suffered by the mortgagee bind the mortgagor, unless he come in upon the voucher. (*u*)

By the 7 Ann. c. 19. it is enacted, that it shall be lawful for all infants trustees and mortgagees, by the direction of the Court of Chancery or Exchequer, signified by an

(*u*) Cro. Jac. 593. cites a case Cha. Prec. 435. .  
in 34 Eliz. Stanhope v. Thacker,

order made upon hearing all parties concerned, on the petition of the person or persons for whom such infants shall be seised or possessed in trust, or of the mortgagor or mortgagors or guardians of such infants or persons entitled to the monies secured upon any lands, tenements, or hereditaments whereof any infants shall be seised or possessed, by way of mortgage, or of the persons entitled to the equity of redemption, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said Court of Chancery or Exchequer shall direct, which conveyances shall be as good to all intents as if such persons were of full age. And by the second section of the same statute it is enacted, that all infants, being only trustees or mortgagees, may be compelled by any such order as aforesaid to make such conveyances or assurances in like manner as trustees or mortgagees of full age are compellable.

The benefit of which provisions is by the 4 Geo. 3. c. 16. extended to the Court of the Duchy Chamber of Lancaster, the Court of Exchequer of the county palatine of Chester, the Court of Chancery of the county palatine of Lancaster, the Court of Chancery of the county palatine of Durham, and the several Courts of the Great Sessions in Wales, with respect to infants trustees or mortgagees in fee, or *pur autre vie* or *vies* of lands, tenements, or hereditaments, within their respective jurisdictions.

By the 4 Geo. 2. c. 10. it is enacted, that it shall be lawful for any person or persons being idiot, lunatic, or non compos mentis, or for the committees of such person or persons, in his, her, or their name or names, by the direction of the Lord Chancellor of Great Britain, or the Lord Keeper, or Commissioners of the Great Seal of Great Britain, for the time being, signified by an order made upon hearing all parties concerned, on the petition

of the person or persons for whom such person or persons, being idiot, lunatic, or non compos mentis, shall be seised or possessed in trust, or of the mortgagor or mortgagors, or of the person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any such person or persons being idiot, lunatic, or non compos mentis, is, or are, or shall be seised or possessed, by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, shall by such order so to be obtained direct. And that such conveyances and assurances shall be as good and effectual in law as if such idiots, lunatics, or non compotes mentis, were of sane mind and understanding, or had themselves executed the same. The statute also enacts, that all such person and persons, being idiot, lunatic, or non compos mentis, and only trustee or trustees, mortgagee or mortgagees, as aforesaid, or the committee or committees of all and every such person and persons, being idiot, lunatic, or non compos mentis, and only such trustee or mortgagee as aforesaid, shall and may be empowered and compelled by such order so as aforesaid to be obtained, to make such conveyances or assurances in like manner as trustees or mortgagees of sane memory are compellable.

The statute of the 1 and 2 Geo. 4. c. 114, after reciting the 4 Geo. 2. c. 10. and that it was expedient to extend the provisions thereby made to other cases enacts, “ That from and after the passing of this act it shall and may be lawful to and for the lord chancellor of Great Britain, or the lord keeper or commissioners of the great seal of Great Britain for the time being, by an order made on the petition of the person or persons for whom such person or

persons being idiot, lunatic, or non compos mentis (but not having been found such by inquisition), shall be seised or possessed in trust, or of the mortgagor or mortgagors, or of the person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any such person or persons, being idiot, lunatic, or non compos mentis (but not having been found such by inquisition), is or are or shall be seised or possessed by way of mortgage, or of the person or persons entitled to the equity of redemption thereof, to appoint such person or persons as to the lord chancellor, lord keeper, or lords commissioners of the great seal of Great Britain respectively, shall seem meet, on behalf of such person or persons being so idiot, lunatic, or non compos mentis as aforesaid, to convey and assure any such lands, tenements, or hereditaments, in such manner as the lord chancellor of Great Britain, or lord keeper, or lords commissioners of the great seal of Great Britain, shall by such order so to be obtained direct, to any other person or persons; and such conveyance and assurance so to be had and made as aforesaid, shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said person or persons, being idiot, lunatic, or non compos mentis, was or were, at the time of making such conveyance or assurance, of sane mind, memory, and understanding, and not idiot, lunatic, or non compos mentis, and had by him, her, or themselves so conveyed and assured such lands, tenements, and hereditaments; any law, custom, or usage to the contrary in anywise notwithstanding."

And the second section enacts, "That all and every such person and persons, being to be appointed by virtue of this act, shall and may be empowered and compelled by such order so as aforesaid to be obtained, to make such conveyance and conveyances, assurance or assurances as

aforesaid, in like manner as trustees or mortgagees of sane memory are compellable to convey, surrender, or assign their trust estates or mortgages.”

By the titles of these two acts of the 4 Geo. 2. c. 10. and 1 and 2 Geo. 4. c. 114. it appears that a conveyance may be directed under them of any lands, tenements, or hereditaments; of which the idiot or lunatic may be seized or possessed in fee for lives or terms of years. But the act of the 4 Geo. 3. c. 16. relates only to estates of which the infant may be seized in fee, or for the life of one or more *other* person or persons. The act of the 7th of Anne, however, is general; for though from the title it would appear that its operation was confined to estates, of which the infant was seized or possessed in fee; yet, the preamble and enacting part comprize generally *any* estate of which the infant may be seized or possessed. And if argument *aliunde* were necessary to prove this, it might be inferred from the caution with which the 4th of Geo. 3. c. 16. has confined its operation to estates in fee and *pur auter vies*, within the respective jurisdictions therein mentioned.

And by the 39 and 40 Geo. 3. c. 88. s. 11. which enables the crown to dispose of all lands, tenements, and hereditaments, purchased by his Majesty, his heirs or successors, out of any monies from the privy purse, or any monies not appropriated to the public service, or coming to the crown from any persons not being Kings or Queens of this realm, by any instrument under the royal sign manual, attested by two or more witnesses, or by will executed according to the statute of frauds; it is also enacted that all and every the provisions made by law for the conveyance of trust estates by infants, idiots, and lunatics, shall extend to such persons as shall be a trustee or trustees for his Majesty, his heirs and successors, respectively.

In the construction of these acts, of the 7th of Anne and the 4th of Geo. 2., it has been decided,—

That, in order to bring a person within their meaning he must be a mere trustee, without interest, and without duties, for the simple purpose of parting with the estate. (x) And, therefore, where the trusts of a deed as to receipt of purchase-money, and its application by payment to the creditors, remained to be executed, and the lunatic was himself entitled to the payment of his debt out of it, the court held that the lunatic was not a trustee within the meaning of the act of the 4 Geo. 2. (y)

In this last case the lunatic himself was one of the trustees originally appointed by the deed : but, in case of a mortgage coming to an infant as heir at law to the mortgagee, though the infant be entitled to a share of the mortgage money as one of the next of kin, yet as the mortgage money is *primâ facie* part of the intestate's general assets, and as such must be paid to the administrator who can give an effectual discharge for the same, the infant (provided the money be paid to the administrator or personal representative,) will be holden an infant mortgagee within the act, and accordingly directed to convey. (z) So where there are executors appointed, and the estate descends upon an infant, the executors may receive the money, which will reduce the infant to a bare trustee within the act. (a)

In like manner where an infant is appointed one of the executors to the mortgagee, and also a residuary legatee, the money being part of the personal estate, may be paid to the co-executor, who can give an effectual discharge for it ; and this will make the infant a trustee within the statute. (b)

(x) *Goodwyn v. Lister*, 3 P. Wms. 387. *In re Harrison*, 3 Austr. 836.

(y) *Ex parte Tufin*, 3 Ves. and Bea. 149.

(z) *Ex parte Carter*, Dick. 609.

(a) *Ex parte Bellamy*, 2 Cox, 422.

(b) — *v. Handcock*, 17 Ves. 383. *Ex parte Marshall* at the



And even where there is no person to give a receipt for the entire mortgage money, and one-third of it has belonged to the infant, an infant has been found a mortgagee within the 7th of Anne, and his share of the money ordered to be paid into the Bank. (c)

And this resolution, it is presumed, is not at all weakened by the subsequent case, *ex parte Sergison*. (d) In that case, A., a mortgagee in fee, devised realty and personalty generally to B., and made him sole executor. The Master found that B. was an infant, of the age of nineteen years; and stated his opinion, that the estate did not pass by the general devise, but descended upon the testator's nephew C. Upon this a petition was presented by the mortgagor, that B. was an infant mortgagee and trustee within the act. The Master of the Rolls gave his opinion that B. was a trustee of the mortgaged estate: but would not order a conveyance, because as executor he was entitled to receive the money. The case came on afterwards before the Lord Chancellor, upon a petition, praying simply that the Master's report might be confirmed. The Lord Chancellor seemed inclined to think that there was enough in the will to pass the mortgaged estate; but said, the best order he could make was, to confirm the report, and to order the money to be paid into the Bank *ex parte* the infant. That the conveyance would be taken from C., the heir at law, (who was willing to convey) and that when the infant came of age, if the petitioners chose he should join, he should think it very reasonable; so that the title would be good, *quâcunque viâ datâ*. Now here it is evident that the

Rolls, June 15th, 1797, in the note 609.

there. The case in the note before Lord Thurlow, 15th March, 1783, is *ex parte* Carter, Dick.

(c) *Ex parte* Winkle, Dick. 276.

(d) 4 Ves. 147.

payment of the money would have reduced the infant to a bare trustee within the act ; but the prayer of the petition being only for confirmation of the Master's report, added to the doubt whether the estate passed by the will of the mortgagor, and the age of the infant, may be thought sufficient to explain why the Chancellor did not enter into the question more fully, or make an order for a conveyance under the statute.

In a case prior to this, there being a doubt whether a mortgaged estate passed under a devise, or descended upon an infant, the Master of the Rolls declared that the infant was a trustee and mortgagee within the act ; and ordered her to convey, so far as any legal estate in the mortgaged premises descended to her. (e)

Estates being devised generally to three, and the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, upon trust, the Court of Exchequer held an infant mortgagee within the statute, and directed him to join in a conveyance. (f)

Where by payment to a co-executor an infant mortgagee is reduced to a bare trustee, and afterwards conveys by lease and release, without an order ; or where an infant conveys as a trustee within the statute, not being so, (but it being in a case in which he would be bound to convey when of age) ; in either case the conveyance will be binding on the infant during minority ; and if, when he becomes adult he seeks to avoid his deed, a court of equity will prevent him. (g)

The words of the act 7 Anne being general, that the infant shall convey lands as the court shall direct, an infant

(e) *Duke of Leeds v. Monday*,  
5 Ves. 341, note. 3 Ves. 348.

(g) *Zouch v. Parsons*, 3 Burr.  
1794. S. C. 1 Blackst. 575. 17

(f) *In re Harrison*, 3 Anstr.  
836.

Ves. 384. and see *Chandler v.*  
*Beard*, Dick. 392.

trustee or mortgagee, being a feme covert or tenant in tail, will be ordered to convey by fine, (*h*) or common recovery. (*i*)

Exceptions will not lie to a Master's report, whether an infant be a mortgagee or trustee within the statute: but the proper mode is to bring it on by a petition, stating the report, that the court may judge of it. (*k*)

It has been decided that the statute of Anne extends to an infant mortgagee of estates in the islands of Grenada, (*l*) and St. Christopher, (*m*) in the West Indies.

And an infant mortgagee is not a trustee for the mortgagor only, but also for the executor of the mortgagee; it being one of the inconveniences that the act intended to remedy, that the executor should not wait for his money till the full age of the heir. Hence it follows that the executor of the mortgagee may apply for a conveyance from the infant to any person named by him, as well as the mortgagor. (*n*)

Under the 4 Geo. 2. c. 10. a lunatic trustee or mortgagee could not be ordered to convey till he had been found lunatic by an inquest. The certificate of a physician would not do; but a foreign finding before a proper jurisdiction, as before the Senate of Hamburgh, was held to be sufficient, and the court would take notice of it. The order in such cases was for the lunatic and committee (or curator or guardian, if a foreign finding,) to convey. And if the lunatic was in such a situation as to make it physically im-

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| ( <i>h</i> ) Ex parte Maire, 3 Atk. 479.      | Ex parte Benton, Dick. 394.                   |
| Com. 615. Lombe v. Lombe, Barnes' notes, 217. | ( <i>l</i> ) Ex parte Bosanquet, Dick. 540.   |
| ( <i>i</i> ) Ex parte Johnson, 3 Atk. 559.    | ( <i>m</i> ) Ex parte Fenniliteau, Dick. 569. |
| Ex parte Bowes, 3 Atk. 164.                   |   |
| Ex parte Smith, Amb. 624.                     | ( <i>n</i> ) Holeworth v. Lane, Mosl.         |
| ( <i>k</i> ) Ex parte Burton, Dick. 395.      | 197.  |

possible to obtain execution from him, in that case execution by the committee alone was held to be sufficient. (*o*)

But, now, under the 1 and 2 of Geo. 4. c. 114, as we have already seen, a conveyance may be directed of the estate of an idiot or lunatic, trustee or mortgagee, before such idiot or lunatic shall have been found so by inquisition.

A mortgagee, either before or after he enters into possession, may assign over his mortgage to another person : but in all such cases the assignee is only entitled to what is really due on the mortgage, and not to what may appear due on the face of it, or what the assignor may represent to be due on the mortgage ; for the rule is, that all accounts between the mortgagor and mortgagee shall be binding upon the assignee. (*p*) Indeed, this rule is carried so far, and very properly, that if the mortgagor, without notice of the assignment, make any payment to the original mortgagee subsequent to the assignment, such payment must be allowed by the assignee, though the assignment of the mortgage were registered. (*q*) And if there be an arrear of interest due on the mortgage, and the assignee upon the assignment pay a gross sum, covering the principal sum and all interest due, the sum paid for the arrears of interest cannot, without the privity of the mortgagor, be made to carry interest. (*r*) Wherefore it is usual with all conveyancers of established practice to make the mortgagor a party to the assignment ; (*s*)

(*o*) *Ex parte Gillam*, 2 Ves. jun. 587. *Ex parte Otto*, 2 Ves. 298. *Ex parte Annandale*, Amb. 80.

(*p*) *Matthews v. Wallwyn*, 4 Ves. 118. 9 Ves. 264.

(*q*) *Williams v. Sorrell*, 4 Ves. 389. 4 Ves. 127, 128. 9 Ves. 269.

(*r*) *Ashenhurst v. James*, 3 Atk. 271. *Earl of Macclesfield v. Fitton*, 1 Vern. 168. *Porter v. Hubbard*, 3 Cha. Rep. 78. Nels. 150. 1 Freem. 303. pl. 370.

(*s*) 4 Ves. 127.

in which case a statement of what is due will be conclusive upon him. (t) But, in cases where the concurrence of the mortgagor cannot be had, the assignee should be satisfied of the money really due; and immediately upon the assignment give notice of it to the mortgagor. (u)

On the other hand, if a person buy a mortgage for less than is actually due, he will be entitled to receive the whole sum really due from the mortgagor. And the mortgagor cannot insist upon paying the assignee only what he paid for the assignment. (x)

The assignment of a mortgage is properly made by a conveyance of the land and assignment of the debt; and all securities given for the payment thereof, and a power of attorney. By this means the power of the assignee is equally complete, both at law and in equity, with that of the mortgagee. But as a mortgage consists partly of the estate in the land and partly of the debt, and so far as it conveys the estate, the assignment is absolute and complete the moment it is made, according to the forms of law, and it would be difficult to say that the land passes, and is well assigned to one person, and yet the debt remains in another, an assignment of the lands only will pass the debt as incident to it; and, consequently, all bonds and covenants for securing the same. (y) But an assignment of the debt only will, in equity, entitle the assignee to the lands mortgaged. (z)

And here it may be necessary to observe that, in all

(t) 2 Scho. and Lef. 296.

117. S. C. 3 Cha. Rep. 23. The rule

(u) 4 Ves. 126, 127. 9 Ves. 410.

is otherwise on purchase by an heir at law, trustee, &c. see *post*.

(x) Williams v. Springfield, 1 Vern. 476. Anon. 1 Salk. 155. Phil.

(y) Jones v. Gibbons, 9 Ves. 410, 411.

lips v. Vaughan, 1 Vern. 336. Baker v. Hellett, Nels. Ch. Rep.

(z) 2 Burr. 978, 979. 3 Ves. and Bea. 49. 3 P. Wms. 308.

deeds conveying or assigning mortgages, a recital of the sum due will be binding, not only upon the mortgagor, but upon the mortgagee, and all other persons parties to it: and such recitals are, in many instances, the only evidence both of the existence of the mortgage, and the sum actually due upon it. (a)

As a mortgagor may be bound by a recognition of the sum due before the assignment, so he may by subsequent acts; as if he permits the assignee to pay the assignor a sum of money which he, with the knowledge of the mortgagor, represents to be due; and more particularly, if he permits it from day to day and from year to year, he cannot quarrel with that representation subsequently approved. (b)

The necessity of giving notice to the mortgagor of the assignment, where the mortgagor is not a party to it, cannot be too strongly insisted upon, as will appear from a case before Lord Thurlow. The facts of which were, a mortgagee assigned by way of mortgage. Upon an account directed it appeared that 7000*l.* was due to the assignee, but nothing remained due upon the original mortgage: the assignee was directed to reconvey, and so completely lost the estate. (c)

In one case it was made a question whether an assignment by parol only will not pass a mortgage: (d) but the point does not appear to have been decided.

“A mortgage,” said Lord Mansfield, “is a charge upon the land: and whatever would give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with

(a) 2 Scho. & Lef. 295, 296.

(c) Lunn v. St. John, cited 4

(b) Chambers v. Goldwin, 9 Ves. 128. 9 Ves. 269.  
270.

(d) Hassell v. Tynte, Amb. 318.

the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds." (c)

The rule that a mortgagee shall be entitled to his costs is almost universal; and depends upon a principle of public policy, with the view of encouraging loans on mortgage, requiring the mortgagor always to be ready with a tender: but exceptions to this rule have been made, as if the mortgagee refused to receive the money after repeated tenders. (f) So on a bill filed by the assignee of a mortgage for foreclosure, a tender by the mortgagor of the balance, after deducting the payments to the mortgagee with costs, deprived the assignee of all the subsequent costs. (g)

In cases, however, of fraud or oppression, the mortgagee, so far from being entitled to costs, will have to pay them. (h) As where a purchaser, having notice of a mesne mortgage, after his purchase, got in the estate of the first mortgagee, upon a bill filed by the second mortgagee to redeem the first, he (the purchaser standing in the place of the first mortgagee) was decreed to pay the costs of the second mortgagee. (i)

So where a solicitor had taken a mortgage for his account, without any previous settlement, it appearing upon enquiry that the account had been surcharged by a great deal more than a sixth; and great delay and expensive litigation having been occasioned by his conduct before any

(e) In *Martin v. Mowlin*, 2 Burr. 269. *Taylor v. Baker*, cited 1 Jac. 978, 979; and see *Silverschildt v. Schiott*, 3 Ves. & Bea. 45. & Wal. 199. *Berrisford v. Milward*, 2 Atk. 49. S.C. *Barnard*. 101.

(f) — *v. Trecothick*, 2 Ves. 389. *Broughton v. Davis*, 1 Price 224. and see cases as to fraud cited post.

(g) *Williams v. Sorrell*, 4 Ves. 389. (i) *Taylor v. Baker*, 5 Price, 306; and see *Mocatta v. Murgatroyd*, 1 P. Wms. 393.

(h) *Quarrel v. Beckford*, 1 Mad.

account could be obtained from him; he was obliged to pay all the costs of the enquiry and litigation from the time of his answer. *(k)* And here it may be remarked that a security granted by a client to his solicitor for costs is a transaction, which courts of law look at with great jealousy, especially if it be for past and future costs; because, where an attorney has such a security, there may not be so much caution in the expenses as would otherwise be applied. *(l)* But a mortgage from a client to his attorney will not prevent the client from having the attorney's bill taxed. *(m)*

In a late case where a mortgagee resisted the right to redemption on the ground of a decree of foreclosure collusively obtained, he was decreed to pay so much of the costs as was occasioned by his controverting the right to redeem. *(n)*

So where a mortgagor filed a bill against the mortgagor to make him account as bailiff; and upon an issue at law it was found that the plaintiff was a mortgagee, upon which he amended his bill to a bill of foreclosure; he was decreed to pay the costs of the issue, and all other costs, which the defendant had sustained beyond what he would have been put to if the bill had been originally a bill of foreclosure. *(o)*

Where a mortgagee filed a bill of foreclosure for the mere purpose of inflicting a chancery suit on the mortgagor, who moved for a reference to the master to inquire what was due, having found the means of payment, the mortgagee was made to pay costs: but Lord Eldon has expressed his disapprobation of this decision on the ground that a mortgagor should be held to a tender. *(p)*

*(k)* Detillin v. Gale, 7 Ves. 583.      *(n)* Harvey v. Tebbutt, 1 Jac. and see 2 Scho. & Lef. 657. 2 Ves. & Wal. 197.

678.      *(o)* Smith v. Smith, Coop. Cha.

*(l)* Daly v. Kelly, 4 Dow. 430, Ca. 141.

431.

*(p)* Shuttleworth v. Lowther,

*(m)* Newman v. Payne, 4 Bro. cited 2 Ves. & Bea. 181. 7 Ves. C. C. 350. 586.



But the costs of an application to enable the committee of a lunatic mortgagee to convey are always borne out of the lunatic's estate, (*q*) whether the application be made by the committee or the mortgagor. So, after the order obtained, all other costs of the committee must be paid out the lunatic's estate. (*r*)

But under an order upon petition for an infant trustee within the statute 7 Ann. c. 19., to convey, the infant will be allowed all costs that may be reasonably incurred, but no more; for instance, a brief to counsel to consent for the infant would not be allowed. (*s*)

Upon a bill for redemption the costs of tracing the representative of the mortgagee to convey must be borne out of the mortgaged estate. (*t*) So, if a mortgagee settles his estate upon a variety of trusts, and the mortgagor comes to redeem, the costs of all the defendants claiming under the mortgagee *cestuis que trust*, as well as trustees, must be paid by the mortgagor. (*u*)

Where, however, a mortgagee devised the estate, and the devisee brought a bill of foreclosure, making the heir of the mortgagee a party to confirm the will, the court would not allow him the costs of the heir, and declared that the estate ought not to be burthened therewith. (*x*) The costs of an inquiry to ascertain the loss of the mortgagee's title deeds, when made upon a bill of foreclosure brought by the mortgagee, must, as it seems, be borne by the mortgagee. (*y*)

An equitable mortgagee who applies for a sale under the

(*q*) *Ex parte Richards*, 1 Jac. & Wal. 264. book it appears that the costs of the Attorney-General, in this case, were

(*r*) *Ex parte Brydges*, Coop. Cha. Ca. 290. decreed to be paid by the plaintiffs, the mortgagors.

(*s*) *Ex parte Cant*, 10 Ves. 554. (*u*) *Wetherell v. Collins*, 3 Mad. 255. See also *Fearn v. Young*, 10 Ves. 184.

(*t*) *Smith v. Bicknell*, 3 Ves. & Bea. 51. n. From the Register's (*x*) *Skipp v. Wyatt*, 1 Cox, 353. (*y*) *Robson v. Stokoe*, 3 Ves. & Bea. 51.

general order for sale, on the mortgagor's becoming a bankrupt, will not be entitled to the costs of his petition. (z) But the rule is otherwise, if he has any writing expressing the terms upon which the deposit was made. (a)

If the mortgaged estate of a bankrupt be sold under this general order for sale, and the mortgagee himself becomes the purchaser at the sale for a sum less than the money due upon the mortgage, he will be liable to pay the solicitor, under the commission, all the expences of bringing the estate to the sale. (b)

In questions between mortgagor and mortgagee, if the mortgagee insists upon a point which is only doubtful, he will be allowed his costs. (c)

An issue at law having been directed on a bill to redeem, shews that there was weight in the objection, and that the conduct of the mortgagee was not vexatious so as to make him pay the costs of it. (d)

And on a bill by a first mortgagee, if a sale be directed with the consent of a second and third mortgagee, and the produce of the sale prove insufficient to pay them all; the costs of the sale must be paid in the first place. (e)

As between several mortgagees each is paid his debt, principal, interest, and costs, according to the respective priorities. (f)

If a mortgagor, on a bill to redeem, suffer a decree to be taken, referring it to the master to take an account of what is due for principal and interest, in the usual manner, including costs, it will be too late for him to object to the mortgagee's being entitled to costs, though the report find the mortgagee overpaid. (g)

(z) Ex parte —, 2 Mad. 281. 205.

(a) Ex parte Brightens, Swanst. 3. (d) Wilson v. Metcalf, 3 Mad. 45.  
Ex parte Trew, 3 Mad. 372. Ex (e) Keene v. Scrafton, 13 Ves.  
parte Garbutt, 2 Ro. B. C. 78. 370.

(b) Bowles v. Perring, 2 Bro. & (f) Wortley v. Birkhead, 2 Ves.  
Bing. 457. 575.

(c) Perry v. Barker, 13 Ves. 198. (g) Gilbert v. Golding, 2 Anstr.

The costs to which a mortgagee is entitled are not taxed as in an adversary suit: but he is allowed all his costs and expences, as is done in the case of a solicitor. (*h*) And, if at law the mortgagee has been decreed taxed costs only, equity will help him to his full costs. (*i*)

Devises of estates by mortgagees in fee and trustees are generally construed by the same rules of construction; and the cases to be met with upon the subject seem very much blended.

The modern rule with respect to devises by trustees, as collected by Lord Eldon, is this, that "a will, containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction; nor any such disposition of the estate as is unlikely for a testator to make of any property not in the strictest sense his; as complicated limitations: nor any purpose at all inconsistent with as probable an intention to vest it in" any person "as devisee as to let it descend" then there is no "case in which a mere devise in general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects, or the person of the devisee, has been held not to pass the trust estate." (*j*) But "that where general words are used, and upon the will the testator makes a disposition inconsistent with the disposition of that which is not his own, you confine the general words." (*k*) There is, however, one circumstance connected with the law of mortgages, which may be brought forward as evidence of intention against mortgaged estates passing by a general devise, which the estates of trustees have not. And that is, that a

442. Owen v. Griffith, Amb. 520. (*i*) Ramden v. Langley, 2 Vern. Lord Trimleston v. Hamill, 1 Ball. 536.

& Beat. 386.

(*j*) 8 Ves. 436.

(*h*) Lomax v. Hide, 2 Vern. 185.

(*k*) 10 Ves. 103.

Hunt v. Fownes, 9 Ves. 70.

mortgage is considered as part of the personal estate of the mortgagee. And to this circumstance great deference has been paid, both by the courts of law and equity, in construing devises by mortgagees.

In conformity to these rules, if a mere trustee devise generally to A. and his heirs, the legal estate in the trust property will pass to A., clothed with the original trust. (*l*)

But if a mortgagee devise all his real estates, or, which is the same thing, devise his lands, tenements, and hereditaments, generally to A. and his heirs, and there is nothing in the will to shew that he considered his mortgaged estate as part of his real property, there, it seems, that the mortgaged lands shall not pass by such general devise. (*m*) And in favour of this construction a very strong argument is furnished by a case in the King's Bench: (*n*) there, a mortgagee in fee of copyholds in the manor of Wyke Regis, in the county of Dorset, having also other lands in the same manor, and having surrendered them all to the use of his will (as to the mortgaged estate, subject to the condition for redemption,) devised all his lands, tenements, and hereditaments, within and parcel of the said manor of Wyke Regis, and also all other his lands, tenements, and hereditaments, in the county of Dorset, to his son H. W., and A. his wife, and to the heirs of the body of his said son H. W., on the body of the said A., with remainder to the testator's right heirs. The testator also devised to H. W. all his goods, chattels, and personal estate. Two points were made, 1st, Whether any estate tail was created in the mortgaged premises, which depended upon their passing by the devise as real estate. And, 2ndly,

(*l*) *Braybroke v. Inskip*, 8 Ves. 417. this Treatise; and *Attorney General v. Vigor*, 8 Ves. 276.

(*m*) 1 Atk. 605. As to which see 5 Term Rep. 651. 8 Ves. 437.; (*n*) *Martin v. Mowlin*, 2 Burr. 969. but see the other cases mentioned in

If any estate tail was created, whether it was barred. The Court having taken two days to consider, Lord Mansfield delivered their resolution, as to the second point, that if an estate tail was created, it was well barred: but, as to the first point, he held that the testator had given it as a debt for the payment of his debts and legacies. "I give and bequeath to my son H. W. all my goods, chattels, and personal estate whatsoever, he paying my debts, legacies, and funeral expences." That there was nothing to controul this but the general words, "all my lands, tenements, and hereditaments, within and parcel of the said manor, &c." But his creditors and legatees had a right to have it considered as personal estate. That he meant to pass it as a debt; and, consequently, that the mortgaged estate had not passed by the devise of the real estates. Now this case, we are to observe, was decided previous to the rule which has since been held, that the devise of an estate tail is a presumption that estates held in trust shall not pass; (o) that this circumstance is not so much as noticed by Lord Mansfield as any wise influencing the judgment; but the whole of the argument on the first point turns upon the question, whether the testator meant to dispose of the mortgaged estate as land, or as a bequest of money only.

So in a case before Lord Eldon, where a testator, being entitled to a mortgage in fee, devised "all and singular his messuages, tenements, lands, hereditaments, and premises, and all his real estate, of what nature, kind, or quality soever, and wheresoever, charged with the payment of an annuity of twenty pounds to his brother for his life; the Court said that the charge of twenty pounds per annum might last longer than the mortgage, which was enough to shew that he did not mean to charge the

(o) *Attorney-General v. Buller*, Ves. 571. See also 8 Ves. 437.

5 Ves. 339. *Ex parte Brettell*, 6

mortgaged estate as real estate, and that it was not charged upon the personal estate. (*p*)

The foregoing cases seem to settle a question which has sometimes been made ; (*q*) viz. if a mortgagee in fee devise all his real estate to A., and all his personal estate to B., whether the lands in mortgage do not pass to B. ? since it is reasonable to suppose that he intended the debt and the security for it to vest in the same person. And if it be contended that there are not words sufficient to pass the fee simple of the lands, it may be held that the word “ estate,” as coupled with “ personal,” might pass both the land and debt ; and there is no doubt that a gift of the money will carry the interest of a mortgagee in fee in the land upon which it is secured. (*r*) Besides, it has been long since decided, that by a devise of “ mortgages” lands mortgaged in fee shall pass. (*s*)

And the construction of these general devises so as to exclude their passing lands mortgaged in fee will be the same, whether the devise be made previous to the forfeiture of the lands by the non-performance of the condition for payment, or whether after. (*t*)

But at the most we are to observe, that lands mortgaged in fee not passing by a general devise, applicable to all the testator's property, is an equitable doctrine ; that it has never received an express legal decision ; that it has sometimes been questioned even in equity ; (*u*) and that

(*p*) *Ex parte Morgan*, 10 Ves. 101. *Winn v. Littleton*, 1 Vern. 3.

(*q*) *Butler's Co. Lit.* 205 a. note. (1.)

(*r*) 3 Ves. and Bea. 49.

(*s*) *Crips v. Crysil*, Cro. Car. 37. And see *Winn v. Littleton*, 1 Vern. 3. S. C. 2 Cha. Ca. 51. 2

Vent. 351. *Strode v. Russell*, 2

Vern. 62. S. C. 3 Cha. R. 169.

*Contrà, Wilkinson v. Merryland*, Cro. Car. 447. 449. But this case can hardly be held to be law at this day.

(*t*) 2 Burr. 979. 8 Ves. 276, 277.

(*u*) 8 Ves. 437. *Saunders' note*, 1 Atk. 605.

Lord Kenyon has expressed himself to an effect which leaves it doubtful whether the courts of law would not decide in favour of their passing. (x) So that, in all cases of a conveyance of property thus situated, it may be prudent to require the concurrence both of the heir and devisee. (y)

And, in order to prevent all questions of this kind from arising, it is advisable that in wills there should be an express devise of all estates held by the testator in trust or mortgage. (z)

If, indeed, lands be devised generally, subject to the payment of debts, or to a variety of uses to which it would be inconvenient to devote a mortgage in fee, then the construction of the devise, both at law and in equity, would be the same, that it did not pass lands, which the testator held only as mortgagee. (a)

But if a testator devise all his real and personal property to one person, there it is certain that under one or other of these descriptions lands mortgaged in fee shall pass. (b)

So it is equally certain, that if a testator have no property in Dale, except what are mortgaged to him, and he devises all his messuages, lands, and hereditaments in Dale, that in such case, in order to give some effect to the devise, that the mortgaged lands must pass. And this, although the devise be made to uses in strict settlement. (c)

(x) See the judgments in *Doe v. Ves.* 276.

*Parratt*, 5 Term Rep. 654. *Roe dem. Reade v. Reade*, 8 Term Rep. 118. 1 Saund. on Uses, 287.

(y) *Butler's Co.* Lit. 205 a. note (1).

(z) *Practical Points in Convey.* 106. pl. 208. *Co. Lit.* 205 a. note 1.

(a) *Roe v. Reade*, 8 T. R. 118. *Strode v. Russell*, 2 Vern. 621. 8

(b) *Ex parte Whitacre in re Vallis.* At the Rolls, 22d July, 1807, stated 1 Saunders on Uses, 285. in the note. And see *Ex parte Sergison*, 4 Ves. 117. *Duke of Leeds v. Munday*, 3 Ves. 348. as explained 5 Ves. 341. note.

(c) *Woodhouse v. Meredith*, 1 Mer. 450. *Clarke v. Abbott*, 2

But, though lands mortgaged in fee may pass by words which are more applicable to personal property; yet it is still necessary that the will be executed according to the solemnities required by the Statute of Frauds. (*d*)

If, indeed, at the time of the devise the estate has become irredeemable in the hands of the mortgagee, either by length of possession, or by a release of the equity of redemption, or under a decree for foreclosure, the mortgaged estate must be considered as part of the real property of the devisor, and will pass by a devise applicable to real estates in general. (*e*) And the rule will be the same if, *after* the making of the devise, the estate becomes absolute in the mortgagee by any of the above means. And in such case there is no equity between the heir and executor, or between a devisee and executor. Nay, for the purpose of including mortgages in a will, where there has been no claim by the mortgagor, a release of the equity of redemption may be presumed. (*f*) Though in most of these respects the old rule was otherwise. (*g*)

Where there had been a decree for foreclosure *nisi*, and the mortgagee devised generally, and died before an account taken, or the mortgagor absolutely foreclosed, the court held that as between the devisor and devisee the mortgaged estate should be considered as realty: but, if assets fell short, it was to be considered as personal estate for the payment of debts. (*h*) But in a late case it was held, that though there has been a decree for account, yet a mortgage should not pass by a general devise of lands in

Eq. Ca. Abr. 606. S. C. Barnard Ch. R. 457.

(*d*) 2 Burr. 978, 979. 3 Ves. and Bea. 49. 6 Cru. Dig. 73.

(*e*) Doe v. Parratt, 5 Term Rep. 652.; and see the cases cited in the two subsequent notes.

(*f*) Attorney General v. Bowyer, 3 Ves. 714. 724, 725. S. C. 5 Ves. 300. 303. S. C. 8 Ves. 277.; but see Thompson v. Grant, 4 Mad.

438.

(*g*) 2 Vern. 625.

(*h*) Garret v. Evers, Mos. 364.



strict settlement, by a will executed antecedent to the final order of foreclosure. (*i*)

A devise of a certain sum of money upon mortgage does not carry the interest due at the time of the death of the testator, (*k*) in the same manner as a bequest of the interest, or the arrears of a mortgage, will not carry the principal. (*l*)

A devise of a mortgage, or of a sum of money out upon such a mortgage, is a specific legacy, and not liable to abatement. (*m*)

But a devise of money on mortgages will not be adeemed by payment in the testator's lifetime, whether such payment be voluntary or compulsory. (*n*)

A bequest of all a testator's property in a particular house, of whatever nature or kind the same may be, will not pass a mortgage and a bond, a collateral security thereto, which are found in that house ; and the testator having excepted a particular chose in action is not evidence sufficiently strong of his intention to the contrary. (*o*)

Money secured by mortgage is within the mortmain act, 9 Geo. 2. c. 36. and cannot be devised to a charity. (*p*) But the two Universities, their colleges, and the scholars upon the foundation of Eton, Winchester,

(*i*) *Thompson v. Grant*, 4 Mad. 438.

(*k*) *Roberts v. Kuffin*, Barnard Ch. R. 259. S. C. 2 Atk. 113.

(*l*) *Hamilton v. Lloyd*, 2 Ves. jun. 416.

(*m*) 1 Atk. 508. in *Lawson v. Stitch*.

(*n*) *Attorney General v. Parkin*, Dick. 422, S. C. Amb. 566. *Hambling v. Lister*, Amb. 401. *LeGrice v. Finch*, 3 Mer. 50.

(*o*) *Fleming v. Brook*, 1 Scho.

and Lef. 318. *Moore v. Moore*, 1 Bro. C. C. 127.

(*p*) *Attorney General v. Meyrick*, 2 Ves. 44. *Attorney General v. The Earl of Winchelsea*, 3 Bro. Ch. Ca. 373. *Pickering v. The Earl of Stamford*, 4 Bro. C. C. 214. *White v. Evans*, 4 Ves. 21. *Kuapp v. Williams*, 4 Ves. 430. note. (a mortgage on turnpike tolls). *Howse v. Chapman*, 4 Ves. 542. *Johnston v. Swann*, 3 Mad.

457.

and Westminster, being excepted out of this act, a devise to them will be good. (q)

Where a mortgage has become vested in one person as tenant for life, with remainder in fee to another, the old rule was, that upon payment of the mortgage money the tenant for life should be entitled to a proportion of the principal. In *Brent v. Best*, before Lord Nottingham, which seems to be the only case in which the question immediately arose, the ordinary rule of the Court in such case was said to be, that one-third of the money should be paid to the tenant for life, and the two-thirds residue to the remainder man. (r) But then, at that time of day, it was also the rule that if an estate, subject to a mortgage, were devised to one for life, with remainder over in fee, the tenant for life should pay one-third of the principal money; so that in such cases the interest of a tenant for life seems to have been accounted in the proportion of one-third to the whole. (s) Now the inconvenience of this rule in the latter instance being early felt, has been long since removed; and, by a variety of decisions, it is now fully established that a tenant for life, instead of paying any proportion of the principal mortgage money, shall be bound to keep down the interest of the whole; so that at this day there can be no doubt that the rule, as stated in *Brent v. Best*, would not hold; on the contrary, that the rule in the opposite case would hold also in the case of a mortgage being settled upon one for life, with remainder to another in fee, and that the tenant for life would in such case be entitled to the interest of the whole mortgage money during his life, which might be effected by directing the mortgage money, if paid off, to be laid out in land, to be

(q) *Attorney General v. Parkin*, ton, 1 Vern. 4.

Dick. 422. S. C. Amb. 566.

(s) *Cornish v. Mew*, 1 Cha. Ca.

(r) 1 Vern. 70. See also the second observation in *Winn v. Little-*

271.; and see *post*, chap. 5.

settled to the uses of those devised ; and the convenience of this rule will most fully appear by considering how difficult it would be to settle the proportions, if, instead of being given to one for life, with remainder over in fee, the mortgaged estate should be limited to a variety of uses in strict settlement. (*t*)

In the case of a mortgage in fee, where the mortgagee has been for a long time in possession, so that it is doubtful whether the equity of redemption be extinguished or not ; or in any case where it is doubtful whether the mortgage be real or personal estate, and the mortgagee is about to make his will ; the way is, to devise it as being part of the testator's real estate, and direct that if it shall be decreed redeemable, then the money to be laid out in lands, and conveyed to the person to whom the devised lands were given as real estate. (*u*)

If the tenant for life die in a broken part of the quarter or half-year, the interest on the mortgage will be apportioned ; and what is due from the last day of payment to the day of the death of the tenant for life will be paid to his personal representative, and the residue to the remainder man. (*x*) In which respect the interest on a mortgage differs from the dividends on stock, and from rent reserved on a lease by the owner of the fee. (*y*)

If two persons lend money on a mortgage, which is made to them jointly, though at law both the land and money would survive, they are nevertheless tenants in common, as to the money, in a court of equity ; for equity presumes that each meant to lend his own, and take back his own. (*z*)

(*t*) See and consider *Whitaker v. Whitaker*, 4 Bro. C. C. 31. *Noys v. Mordaunt*, 2 Vern. 581. *Cotton v. Iles*, 1 Vern. 271.

(*u*) *Bradley's Pract. Points in Conveyancing*, 62. pl. 131.

(*x*) *Edwards v. Countess of Warwick*, 2 P. Wms. 171.

(*y*) *Wilson v. Harman*, 2 Ves. 672.

(*z*) 3 Ves. 631. 2 Ves. 258.

And the Court will not allow the money to survive, though, one of the mortgagees being dead, it be afterwards paid on the day appointed, according to the condition. (*a*)

And if two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those persons who are the proper representatives of each. (*b*)

In consequence of which principle, the executors of the deceased mortgagee should, on transferring or retransferring the mortgage, be a party to direct the surviving mortgagee to convey; for, as to the amount of the money advanced by the deceased mortgagee, the surviving mortgagee is a mere trustee for the executors of the deceased mortgagee. (*c*)

And if two persons, being mortgagees, purchase the equity of redemption, (*d*) or foreclose, (*e*) they shall hold the land as tenants in common.

But if a voluntary mortgage be made to two, and no intention of the party to make a severance appears, it will survive. (*f*)

So if a husband lends out money on mortgage, in the name of himself and his wife, and then dies, the wife is entitled to the survivorship, on the presumption that it was intended as a provision or advancement for her. (*g*) Though it has been said, that if there are creditors, the husband and wife being joined in the security would not avail her against them. (*h*).

The interest which a husband on marriage acquires

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|--|--------------|---|
| ( <i>a</i> ) Petty v. Styward, 1 Cha. Rep. 31. S. C. 1 Eq. Ca. Abr. 290. | 292.         | ( <i>e</i> ) 2 Ves. 258.                          |
| ( <i>b</i> ) Partridge v. Pawlet, 1 Atk. 467.                            |              | ( <i>f</i> ) 3 Ves. 631.                          |
| ( <i>c</i> ) Pow. on Mortg. 700.   | 2 Vern. 683. | ( <i>g</i> ) Christ's Hospital v. Budgin,         |
| ( <i>d</i> ) Edwards v. Fashion, Cha. Prec. 332. S. C. 1 Eq. Ca. Abr.    |              | ( <i>h</i> ) Gatty v. Quarrel, cited 2 Vern. 684. |

in mortgages made to the wife before marriage, is as to the mortgage money, like to the interest which he has in any other money, secured to the wife by specialty; and, if it be a mortgage for a term of years, he has the same power over the term as over any other term to which the wife may be entitled. Thus, he may reduce the money into possession, and so become absolutely entitled to it; or he may dispose of it for a valuable consideration; and if it be secured by a mortgage for years, he may dispose of the mortgage term also: (*i*) but, if it be secured by a mortgage in fee, the husband alone cannot dispose of the land without the wife, but the wife and her heirs will be trustees for the assignee. (*k*) And if the husband becomes bankrupt, his assignees may dispose of the mortgage money, though it be secured by a mortgage in fee. (*l*) And so, if the wife survives, the executors of the husband cannot claim it; but she will be entitled to it as well as any other chose in action not reduced into possession during the coverture. (*m*) But if the husband survive, he will be absolutely entitled to the mortgage money; and the heirs of the wife, if it be a mortgage in fee, will be trustees for him. (*n*) And so, if the wife be only entitled to an equitable interest in the mortgage, the husband may become a purchaser of the mortgage by a settlement on the wife before marriage, in consideration of her fortune; (*o*) or the trustees will

(*i*) *Packer v. Wyndham*, Cha. Prec. 412. S. C. Gilb. 98. *Bates v. Dandy*, 2 Atk. 207.

(*k*) *Bosvil v. Brander*, 1 P. Wms. 460. Gilb. Lex. Præc. 277. *contra*.

(*l*) *Bosvil v. Brander*, 1 P. Wms. 458.: but see 9 Ves. 97.

(*m*) *Burnett v. Kinnaston*, 2 Vern. 401. 3 P. Wms. 199. 10 Ves. 99. S. C. Cha. Prec. 118.

states that the husband survived.

(*n*) *Turner v. Crane*, 1 Vern. 170. *Squib v. Wyn*, 1 P. Wms. 378. *Packer v. Windham*, Cha. Prec. 412. 29 Car. 2. c. 3. s. 25.

(*o*) *Blois v. Hereford*, 2 Vern. 501. *Sykes v. Meynal*, Dick. 368. case of a settlement after marriage. When and how the settlement must be made to entitle the husband in

have the like claim upon him for a settlement on the wife, on paying over the mortgage money, as in case of a legacy or portion given to the wife. (*p*)

It is now clearly settled (*q*) that the personal representative of a mortgagee will, in every case, be entitled to the mortgage money. And this rule holds, though the mortgage be in fee; though the condition be for payment to the mortgagee, his heirs, or executors; though there is no want of assets; and though there be no bond given, or covenant entered into by the mortgagor for payment of the money; and whether the mortgage be forfeited or not at the death of the mortgagee. (*r*) For as the mortgage money was, in the first instance, taken out of the personal estate; so, upon payment, will it return to the same.

If the condition is for payment to the heir or executor, and the mortgagee die before the day of payment, the mortgagor may, indeed, by payment to the heir, save the benefit of the condition; but the heir will take it in trust for the personal representative. (*s*) And if a mortgage in fee descend upon an heir, he will hold the lands as a trustee for the executor. (*t*)

But if the mortgage has by any means become irredeemable in the hands of the mortgagee, then the land must be taken as part of his real estate.

This, however, must be settled at his death, or at the death of the person entitled both to the land and mo-

such case, see *Garforth v. Bradley*, 2 Ves. 675. *Mitford v. Mitford*, 9 Ves. 87.

(*p*) *Packer v. Windham*, Cha. Prec. 412. S. C. by the name of *Parker v. Windham*, Gilb. 98. The order thereof, 19 Mar. 1712.

(*q*) For the positions on this subject generally see the Judgment of

Finch, Lord Keeper, in *Thornbrough v. Baker*, 1 Cha. Ca. 283. *Viner's Abr. tit. Executors*, U. Vol. XI. 147 to 152.

(*r*) *Butler's Co. Lit.* 208 b. note (1.)

(*s*) *Turner's case*, 2 Ventr. 348. *Littleton's case*, 2 Ventr. 348.

(*t*) *Barnard*, 49, 50.

ney; (u) for if it becomes afterwards irredeemable in the hands of the heir, either by length of possession, or by his purchasing the equity of redemption or foreclosing, after his ancestor's decease, or by the mortgagor refusing to redeem, (x) the heir will nevertheless be a trustee for the personal representative. And this, although there are no debts of the mortgagee, or all the debts are satisfied. (y) And the heir will, upon application, be directed to convey it to the personal representative. (z) And there being a bond or covenant to pay or not in these cases makes no difference. But in a case in *Vernon* it was said by the court that, if the executor or administrator should, after foreclosure by the heir, come against him to have the benefit of the mortgage, the heir might well say, "I will pay you the money, and take the benefit of the foreclosure to myself," in case the land be worth more than the money. (a)

A Welch mortgage will be considered as part of the personal estate of the mortgagee. (b)

And a mortgage of an inheritance to a citizen of London has been held to be part of his personal estate, and to be dividable according to the custom. (c)

If the lands in mortgage are afterwards devised to or become settled upon the mortgagee for life, or in tail, the claim which he has upon the estate for the mortgage money shall not merge, but the charge will subsist for the benefit of the personal representative.

(u) 5 Ves. 303. 8 Ves. 277. (z) *Ellis v. Gnavas*, 2 Cha. Ca. 50.  
*Fisk v. Fisk*, Cha. Prec. 11.

(x) *Ellis v. Gnavas*, 2 Cha. Ca. 50. *Clerkson v. Bowyer*, 2 Vern. 67; see also 2 Cha. Ca. 50. That heir cannot, in general, foreclose without joining the executor, see post. Chap. on Foreclosure.  
 66. *Gobe v. Carlisle*, there cited.  
*Tabor v. Grover*, 2 Vern. 367. 2 Vern. 193.

(y) *Wood v. Nosworthy*, cited 2 Vern. 193. *Ellis v. Gnavas*, 2 Cha. Ca. 50. (b) 1 Ves. 406.  
 (c) 1 Cha. Ca. 285. 2 Freem. 144.

But if the mortgagee become entitled to the estate in fee simple, as if it descends upon or is devised to him, the general rule is that the charge shall merge, (*d*) unless he declares his intention to the contrary; (*e*) or unless it be more for his benefit that the charge should subsist, as if there be subsequent incumbrancers, whose claims would be preferred to his mortgage, in which case equity would hold the charge subsisting separate from the estate, in order to give the mortgagee his due priority over the other incumbrancers, unless, indeed, he has done something to shew that he has elected to give up his claim as mortgagee. But a mere entry upon the land, or acting as absolute owner, is not, in such a case, sufficient to shew that he intended the charge to merge. (*f*)

The ground of mortgages being considered as the personal estate of the mortgagee, being that the money is advanced on a loan only, (*g*) whenever this ground fails there is no reason for preferring the personal to the real representative.

Therefore where a mortgagee in fee entered for a forfeiture; and after seven years' enjoyment absolutely sold the land to I. S. and his heirs; the court said that the estate should not be looked on to be a mortgage in the hands of I. S., so as to make it part of his personal estate; but it should be for the benefit of the heir. (*h*)

So where a testator devised a mortgage in fee to his two daughters and their heirs, as tenants in common; one of the daughters being dead without issue, her husband took out administration to her, and claimed a moiety of the lands as part of her personal estate. But it was held that

(*d*) *Duke of Chandos v. Talbot*, 2 P. Wms. 604. (*f*) *Forbes v. Moffatt*, 18 Ves. 384.  
 (*e*) *Thomas v. Kemeys*, 2 Vern. 402.  
 (*g*) *Longuet v. Scawen*, 1 Ves. 246.

(*h*) *Cotton v. Isles*, 1 Vern. 271.  
 348. *Powell v. Morgan*, 2 Vern. 90.



although it was a mortgage as between the mortgagor and mortgagee, yet the testator's intent was that it should pass to his daughters as a real estate to them and their heirs, and not as part of his personal estate; and that, therefore, the land must go to her heirs at law. (*i*)

And it was in consequence of this reason, *viz.* that the transaction appeared to be one of borrowing and lending, that Lord Hardwicke decreed that an annuity, granted to a man and his heirs in consideration of a *debt* due to the grantee, redeemable at the will of the grantor, was personalty. (*j*)

In order to know in what court a will should be proved, or letters of administration taken out, it may be useful to recollect that mortgages for terms of years are assets where the lands lie: but a mortgage in fee, like a bond, is assets where the mortgage deed is, at the time of the decease of the mortgagee. (*k*)

In all cases where a mortgagee enters, and takes possession of the estate, he makes himself liable to an account for the profits, for he becomes as it were a bailiff to the mortgagor. But he will be allowed no salary or other recompence for his trouble. (*l*)

In like manner if a mortgagee be in the first instance let into the possession of the estate, he makes himself accountable, notwithstanding the deed is absolute, the proviso for redemption at a distant period, and the profits of the estate uncertain; for this liability to account is a necessary consequence of the rule that says a mortgagee shall take nothing by his mortgage, except his claim for principal, interest, and costs. (*m*)

(*i*) *Noys v. Mordaunt*, 2 Vern.

581. S. C. *Gilb. 2. Cha. Prec.* 265.

*Garrett v. Evers*, Mos. 364.

(*j*) *Longuet v. Scawen*, 1 Ves. 476.

(*k*) *Brad. Pra. P.* p. 5 and 6.

(*l*) 2 Atk. 534.

(*m*) *Fulthrope v. Foster*, 1 Vern.

And even in the case of a Welch mortgage, where the profits always go in lieu of the interest, it seems that if the value were excessive, the court would decree an account, notwithstanding the agreement for retaining the profits in lieu of interest. (*n*)

A creditor in possession, under a power of attorney, may account as a receiver, which will entitle him to a salary for his trouble: but if such creditor take an assignment of a mortgage, he must thenceforth account as a mortgagee. (*o*)

If a mortgagee in possession assign over his mortgage, without assent of the mortgagor to an insolvent person, the mortgagee will be bound to answer the profits, both before and after the assignment; for he is under a trust to answer the profits of the pledge; and it is a breach of trust to assign such pledge to an insolvent person. (*p*)

On the other hand, where an assignee takes an assignment without the previous authority of the mortgagor, or his declaration, that so much is due, the assignee will be liable to an account for all the profits received by the mortgagee and all intermediate assignees; and it is sufficient if the mortgagor, on a bill for account, make the last assignee a party. (*q*)

If the lands be leased by the mortgagor, and the mortgagee enters into possession, he will have to account at the rate of the rent reserved. (*r*) And if the mortgagor can shew that the lands were let at such a price at any time during the possession of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shew the contrary. (*s*)

(*n*) 1 Vern. 477.

268, 269. Contra 2 Eq. Ca. Abr.

(*o*) Trimleston v. Hamill, 1 Ball. and Beat. 377.

594. pl. 3. Pearson v. Pulley, 1 Cha. Ca. 102.

(*p*) 1 Eq. Ca. Abr. 328. pl. 2.

(*r*) 1 Bail. & Beat. 385.

2 Cha. Ca. 3. 3 Bac. Abr. 658.

(*s*) Blacklock v. Barnes, Sel.

(*q*) Chambers v. Goldwin, 9 Ves. Cha. Ca. 53.

For the general rule is that a mortgagee shall be accountable only for what profits he may actually receive, and not for what he might have received, unless there be fraud, or wilful default, as that he turned out a sufficient tenant that held it at so much rent, or refused to accept a sufficient tenant, that would have given so much for it. (*t*)

So if the mortgagee use his security improperly, so as to keep out subsequent incumbrancers, and yet permit the mortgagor to receiver the rents, he will, as against the subsequent incumbrancers, be liable to account for the rents which he received, or might have received, after his entry. (*u*)

In like manner if a mortgagee, with notice of a subsequent mortgage, joins the mortgagor in a sale of part of the lands mortgaged, and allows the mortgagor to receive the money, the purchase money so received shall, in favour of the second mortgagee, sink so much of the first mortgage. (*x*)

Where a mortgagee recovered in ejectment, and, in combination with the tenant, refused to enter, so as to prevent the mortgagor from ejecting the tenant, it was ordered that, unless the mortgagee took out execution before the end of the term, he should be answerable for the profits, as in case of wilful default. (*y*)

An agreement that a mortgagee shall enter into possession of the lands at a fair rent, in discharge of his debt, is a fair agreement; and will be supported in equity, par-

(*t*) 1 Cha. Ca. 258. Anon. 1 267. Maddocks v. Wren, 2 Cha. Vern. 45. Hughes v. Williams, 12 Rep. 109.

Ves. 493. See also 1 Ball. & Beat. (x) Bentham v. Haicourt, Cha. 385. Contra Harnard v. Webster, Prec. 30. See this case cited post. Sel. Cha. Ca. 53. (*y*) Duke of Bucks v. Sir Robert

(*u*) Cropping v. Cooke, 1 Vern. Gayer, 1 Vern. 258.  
270. Chapman v. Tanner, 1 Vern.

ticularly if the mortgagor lies by for twenty years without complaining. (z)

A mortgagee, who opens a mine or stone-quarry, does it at his own hazard, and will not be allowed any loss which he may have sustained in so doing. (a)

But all expences, for which he has a lien upon the premises, he shall be allowed in accounting, as renewal fines, costs of suit, and necessary repairs. (b)

So where a mortgagee, thinking himself absolutely entitled, has laid out money in repairs, or lasting improvements, he will be allowed such expenditure, with interest, after the rate of the current interest of the country in which the lands lie. (c)

If the title deeds are stolen from a mortgagee, an account will be directed with an enquiry concerning what is become of the title deeds. (d)

A mortgagee of stock, transferring it to another person without the consent of the mortgagor, will be liable to account for it to the mortgagor, as a sale, at the price of the stock at the day when it was so transferred. (e) And the rule is the same, though the transfer be made by way of mortgage; on account of the risk to which such transactions are subject. (f)

But a mortgagee of stock, wishing to be repaid, may sell out the stock, and repay himself; and he will not be

(z) *Morony v. O'Dea*, 1 Ball & Beat. 117. *Acherley v. Roe*, 5 Ves. 565. 281, 282. S. C. 13 Ves. 378. *Thorne v. Newman*, Fin. R. 38. 3 Atk. 518. See 1 Ball & Beat. 385.

(a) *Hughes v. Williams*, 12 Ves. 493.

(d) *Stokoe v. Robson*, 3 Ves. & Bea. 51. *Smith v. Bicknell*, in note there. Rep. temp. Finch. 239.

(b) 3 Atk. 518. *Degelder v. Depeister*, Fin. R. 206. *Lomax v. Hide*, 2 Vern. 185. 1 Ball & Bea. 385.

(e) Ex parte *Dennison*, 3 Ves. 552. *Andre v. —*, there cited.

(f) See the cases cited in the

(c) *Quarrel v. Beckford*, 1 Mad. last note.

liable to account for more than he sold it for, though the funds should rise. (*g*)

In taking an account, the master cannot make annual rests, unless the decree orders it. (*h*) In general, indeed, mortgagees are not liable to account annually; (*i*) and, therefore, decrees in general (*k*) do not direct annual rests, but the account is made by calculating simple interest on the mortgage money, and ascertaining the total rents, and then deducting the total rents received from the principal mortgage money and interest so calculated upon it. (*l*)

But, under special circumstances, where the mortgagor will be materially injured without it, the court will direct annual rests. (*m*)

One circumstance for taking the case out of the general course of decrees, and directing annual rests, so as to make the profits from time to time be applied in payment of the interest; and then, in sinking the principal is where the yearly rents of the mortgaged premises greatly exceed the interest of the money lent. (*n*)

And another exception arises in those cases where there is no interest in arrear, when the mortgagee takes posses-

(*g*) *Tucker v. Wilson*, 1 P. Wms. 259. *Lockwood v. Ewer*, 2 Atk. 303.

(*h*) *Webber v. Hunt*, 1 Mad. 13.

(*i*) 1 Ball & Beat. 383.

(*k*) *Fowler v. Wightwick*, A. D. 1810, cited 1 Mad. 14. *Hall v. Callidge*, Apr. 21st, 1812. *Bennett v. Kneebine*, April 27th, 1812. *Hansard v. Hardy*, Feb. 3d, 1812. *Elisha v. Elisha*, Feb. 14th, 1812. *Baker v. Rose*, July 2nd, 1811. *Maddock v. Maddock*, July 4th, 1811. *Dighton v. Earl of Maccles-*

*field*, March 30th, 1814; and *Morgan v. Lewis*, Nov. 29, 1811. Cited in *Davis v. May*. Coop. Cha. Ca. 238. *Ashenhurst v. James*, 3 Atk. 272.

(*l*) Coop. Cha. Ca. 239, 240.

(*m*) Coop. Cha. Ca. 240. *For-side v. Boyers*, June 20, 1811; and *Kingston v. Roper*, Dec. 3, 1811, cited Coop. Cha. Ca. 239. *Webber v. Hunt*, 1 Mad. 13.

(*n*) *Gould v. Tancred*, 2 Atk. 534. *Quarrel v. Beckford*, 1 Mad. 283.

sion; for in such case the account will be directed with annual rests. (o)

And where annual rests are directed, and the mortgagee has been at any expences, the court will so direct the account as that the mortgagee shall not lose the interest on his expences; as suppose the account is directed for ten years back, at which time the mortgagee had incurred a variety of costs, charges, and disbursements, the profits of the estate will be first applied in satisfying these expences, and then in sinking the principal. (p)

A decree will make annual rests either throughout, or not at all; there is no intermediate case directing annual rests from a certain time only. (q)

Where a mortgagee had been overpaid, at the time that a bill for an account and redemption was brought against him, he was charged with interest on the balance from the filing of the bill; for, at that time, the demand was made, and ought to have been complied with according to the justice of the case. (r)

The object of directing annual rests is to give compound interest; (s) and where such compound interest is charged on one side, it will be allowed on the other; for the benefit ought to be mutual. (t)

The master cannot allow for improvements under the words "all just allowances" in a decree; but there must be a special order for that purpose. (u)

It is the constant practice, in decrees to account, to direct it without future words, videlicet, to account for what they have received, or might have received, if it had not been for their

(o) *Shepherd v. Elliot*, 4 Mad. 283, 284, 285. *Trimleston v. Hamill*, 1 Ball & Beat. 377.

(p) *Lomax v. Hide*, 2 Vern. 185. (s) *Raphael v. Boehm*, 11 Ves. 92.

(q) Per Sir Wm. Grant, Coop. Cha. Ca. 240. (t) 1 Mad. 283.

(u) *Knowles v. Spence*, Mose. 226.

(r) *Quarrell v. Beckford*, 1 Mad.

own wilful default; yet, if the person decreed to account receive any thing subsequent to the decree, it is enquirable before the master; and such sums so received must be brought to account. (x)

An account fairly taken and settled is to every intent binding and conclusive, not only upon the parties, but upon all other persons. Therefore, an account settled between the mortgagor and the first mortgagee shall be binding upon all the subsequent mortgagees, though such subsequent mortgagees were no parties to the suit. (y) So an account taken in a cause between tenant for life of an equity of redemption and the mortgagee shall be binding upon a contingent or other remainder man. (z) And an account taken by a master during the minority of an infant, entitled to the equity of redemption, will bind him when he comes of age. (a) It becomes, therefore, both the mortgagor and mortgagee to object to the defects in an account before the master, that it may be made perfect before him; for the court will not afterwards intermeddle therewith. (b)

And, in directing a second account upon the same mortgage, the court will direct it to be taken from the foot of the last account. (c)

In cases of fraud, or where there has been any error in accounting, the accounts may be set aside or falsified: but then it is necessary that the bill, seeking relief, should specify some particular error, for it is impossible for the

(x) *Bulstrode v. Bradley*, 3 Atk. 179.

582.

(a) *Badham v. Odell*, 4 Bro.P.C.

(y) *Needler v. Deeble*, 1 Cha. 447.

Ca. 299. *Williams v. Day*, 2 Cha.

(b) *Harr. Cha. Prac.* 480, ed.

Ca. 32. *Sherman v. Cox*, 3 Cha.

1808. *Gould v. Tancred*, 2 Atk.

Rep. 47. *Crisp v. Heath*, 7 Vin. 52.

533.

pl. 2.

(c) *Proctor v. Cowper*, 2 Vern.

(z) *Allen v. Papworth*, 1 Ves.

377. 4 Bro. P. C. 450. 454.

164. *Knight v. Lampfield*, 1 Vern.

defendant to defend himself under a general charge, whether of error or fraud. (*d*)

But a bill for a general account will lie against an attorney, who takes a security without a previous settlement of accounts. (*e*) So, if there has been a previous settlement of accounts, if the attorney admit the general allegations of error. (*f*)

And where a mortgagee, being the attorney of the mortgagor, had charged receiver's fees on a subsequent settlement of accounts, without informing his client of the law it was held by the court that the acquiescence of the mortgagor should not be binding upon him, but that he should have liberty to surcharge and falsify. (*g*)

A mortgagee who has been appointed an executor to the mortgagor, refusing executorship, and then settling his accounts with the other executor's, is liable at any time to have those accounts opened. (*h*)

A mortgagor in accounting may take advantage of a recital in a deed of assignment, to shew what was due. (*i*)

Where, after an account settled, the mortgagee has assigned, and the mortgagor, by subsequent recognition, is prevented from questioning the validity of the account with the assignee, he may nevertheless try the question of error with the original mortgagee. (*k*)

(*d*) 9 Ves. 266. *Taylor v. Haylin*, 2 Bro. C. C. 310. *Dawson v. Dawson*, 1 Atk. 1. *Johnson v. Curtis*, 3 Bro. C. C. 266. *Needler v. Deeble*, 1 Cha. Ca. 299. *Knight v. Bampfield*, 1 Vern. 179. *Drew v. Power*, 1 Scho. & Lef. 192.

(*e*) *Detillin v. Gale*, 7 Ves. 583. *Newman v. Payne*, 4 Bro. C. C. 350.

(*f*) *Matthews v. Wallwyn*, 4 Ves. 118. See also *Aubrey v. Popkin*, Dick. 403. 1 Ball & Beat. 104. 107.

(*g*) *Langstaff v. Fenwick*, 10 Ves. 405.

(*h*) *Chambers v. Goldwin*, 5 Ves. 834., affirmed as to this, 9 Ves. 274.

(*i*) 2 Scho. & Lef. 296.

(*k*) 9 Ves. 268, 269.



An account taken under a decree in equity cannot be overhauled at law; so that all legal proceedings will be restrained by injunction. (*l*)

If a mortgagee purchases the equity of redemption for a trifling consideration, which purchase is afterwards set aside as fraudulent, he will have to account as mortgagee; as has been determined by the House of Lords. (*m*)

(*l*) Bell v. O'Reilly, 2 Scho. & Lef. 430.

(*m*) Morley v. Elways, 1 Chz. Ca. 107.

## CHAPTER IV.

## OF THE MORTGAGOR AND THE EQUITY OF REDEMPTION.

**A** Mortgagor, continuing in possession of the estate after the condition forfeited, is generally considered as tenant at will to the mortgagee; but this is only by comparison, for in very many material respects his estate greatly differs from that of a tenant at will. For in the first place, if the mortgagee determines his will, and enters into possession of the estate, the mortgagor shall not be entitled to emblements; but the crops growing upon the land shall belong to the mortgagee: and the reason is, that both the land and the crop are securities for the debt. (*a*)

But, in such case, if the estate be in the occupation of a tenant claiming under a lease granted after the mortgage and the mortgagee recovers, which he is at liberty to do, at any time, without giving notice to the tenant, it is doubtful whether such tenant shall not have free liberty of ingress and regress to take the crop. (*b*)

Another proof that a mortgagor in possession is not considered a tenant at will is furnished from the proceedings in ejectments brought for the recovery of mortgaged lands. For if he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will. (*c*)

(*a*) Doug. 22.

(*b*) Doug. 23.

(*c*) Goodtitle dem. Gallaway v. Herbert, 4 Term Rep. 680.

Whereas it is every day's practice to lay the demise on a day long before there has been any actual determination of the will ; sometimes back to the time when the mortgage became forfeited : and no objection has ever been made on that account. (*d*)

The estate of a mortgagor in possession differs also from that of a tenant at will in this, that the alienation of the mortgagor, by granting away his estate for a term of years, is no determination of the tenancy : but the mortgagee may consider the lessee as a disseisor or not, at his election. (*e*)

On the other hand, an assignment by the mortgagee will be no determination of the will ; for if it were, the mortgagor's continuing in possession would be a disseisin, or divesting of the estate granted in mortgage ; so that the assignee could not assign over without first making a formal entry, or obtaining the concurrence of the mortgagor. But C. J. Holt held that the mortgagor should be considered a tenant, by sufferance, to the second assignee ; for there could be no divesting without a tortious entry ; and that, therefore, the mortgagee or assignee might assign. (*f*) And, indeed, it may be observed, that when a mortgagee covenants for himself and his assigns that the mortgagor shall continue in possession, the covenant being for his assigns will rule the whole case ; and the mortgagor may be presumed tenant at will to all the assigns, as well as to the first mortgagee. (*g*)

So if the mortgagor die, and his heir or devisee enter, it seems that it would not, as against the election of the

(*d*) Per Buller, J. 1 Term Rep. 383.

(*f*) *Smartle v. Williams*, 1 Salk. 245. S. C. 3 Lev. 387. S. C. Holt.

(*e*) *Powseley v. Blackman*, Cro. Jac. 659. Cro. Car. 304. 3 Lev. 388. Skin. 424.

478. S. C. Comb. 247. (*g*) Comb. 249.

mortgagee, be considered a disseisin of his estate, for there would be no wrongful entry, but only a wrongful continuance of the estate ; (*h*) and clearly it would be no disseisin of the estate, if the heir or devisee did any thing to acknowledge the interest of the mortgagee, as by payment of interest.

But though a mortgagee may at any time after the condition forfeited, or before, if there be no agreement to the contrary, recover the possession of the estate, and there is no occasion for any notice to quit, yet the mortgagor will be entitled to retain all the rents which he may have received while he was in possession. (*i*) And this, although the security be taken on a limited interest as a mortgage of an estate for life or years. (*k*) Nay, where the mortgagee has given notice to the tenant in possession to pay the rent to himself only, and the tenant, notwithstanding such notice, has paid it to the assignees of the mortgagor, the assignees will not, either in a court of law or equity, be responsible to the mortgagee for the rent received by them. (*l*) But the tenant paying it over after notice will be liable for the rent to the mortgagee. (*m*)

But if a mortgagor dispossesses the mortgagee of the estate by colluding with the tenants, and prevailing upon them to attorn to him, there, he will have to account for the rents received by him, on account of the fraud. (*n*)

In some cases it has been said, that a mortgagor cannot set up a legal interest in opposition to his mortgagee, because a man cannot dispute his own solemn deed. (*o*)

(*h*) Doe dem. Burrell v. Perkins,  
3 Maul. and Selw. 271.

(*i*) Higgins v. York Buildings  
Company, 2 Atk. 107. 3 Atk. 244.

(*k*) Coleman v. Duke of St. Alban's, 3 Ves. 25, S. C. 5 Ves. 433.  
Swanst. 579.

(*l*) Moss v. Gallimore, Doug.  
279. Wilson ex parte, 2 Ves. and  
Bea. 252.

(*m*) Moss v. Gallimore, Doug.  
279.

(*n*) 3 Atk. 244.

(*o*) Goodtitle v. Bailey, Cowp.

And, again, that a tenant under the mortgagor, having got the mortgage deed, cannot set it up against the mortgagor, because he holds under the mortgagor, and has admitted his title. (*p*) But then these were dicta in decisions made before the rule that a plaintiff in ejectment should recover on the strength of his own title had become so firmly settled as it now is ; insomuch, that at present, a trustee in ejectment must prevail against his *cestui que trust* ; (*q*) so that the law, as thus laid down by these dicta, it is presumed, must be held to be over-ruled. (*r*)

A mortgagor cannot, without the consent of the mortgagee, grant a lease of the lands mortgaged, so as to bind the mortgagee ; (*s*) because by the mortgage the legal estate is taken out of him ; and in equity the claim of the mortgagee shall be preferred to all subsequent claimants. But if a mortgagor do grant a lease, it will pass the equity of redemption for the term mentioned in the lease, and will entitle the lessee to be let in to redeem. (*t*)

As a consequence of the legal estate being taken out of the mortgagor it follows that there can be no legal reservation made to the mortgagor ; (*u*) or any covenants entered into with him which will run with the land, so as to entitle the mortgagee to sue upon them : but such covenants will be covenants in gross in the mortgagor, who may at any time proceed upon them. (*x*)

The liability of a mortgagor contracting to grant a

601. Lord Mansfield's Judgment Doug. 21.

in Doe dem. Bristowe v. Pegge, 1 Term Rep. 759. note.

(*p*) Per Buller, J. 1 Term Rep. 760. note.

(*q*) Roe dem. Reade v. Reade, 8 Term Rep. 118 123.

(*r*) Adams on Ejectment, 33. Serjeant Frere's note, Doug. 23.

(*s*) Keech, dem. Warne v. Hall,

(*t*) Doug. 22. Rand v. Cartwright, 1 Cha. Ca. 59.

(*u*) Moore v. Earl of Plymouth, 3 Barn. and Ald. 66.

(*x*) Webb v. Russell, 1 Term Rep. 393. Stokes v. Russell, 1

Term Rep. 678. affirmed Cam. Scac. 1 H. Blackst. 562.

lease has been thus stated by Lord Redesdale:—"If a mortgagor," says he, "contracts to make a lease, the tenant has a right to say, 'you shall either obtain the consent of the mortgagee, or redeem the mortgage; or, if you complain of the hardship of this, you shall rescind the contract.'" "A court of equity," he continues, "may not compel the mortgagor, if highly inconvenient, to pay off the mortgage, for the purpose of giving effect to the contract: but then he shall not enforce it against the tenant, if the tenant does not wish to abide by it. If the tenant will not give up the contract, the Court might say, that it should not be specifically enforced against the landlord under such circumstances, and leave the tenant to seek his compensation in damages at law." (*y*)

A mortgagor in possession cannot commit waste: but will be prevented by injunction in equity; because a court of equity will not suffer a mortgagor to prejudice the incumbrance. (*z*) But if underwood be comprized in a mortgage, as the cutting of that is part of the ordinary profits of the land, it will not be considered waste, if the mortgagor cuts it in a husbandlike manner, and at the usual seasons. (*a*)

A tenant to the mortgagor, who does not give him notice of an ejectment, brought by the mortgagee, is not liable to the penalties of the 11 Geo. 2. c. 19. s. 12. (*i. e.* three years' improved rent) for secreting ejectments; because, as was observed by the Court, that act extends only to cases where ejectments are brought which are inconsistent with the landlord's title. (*b*)

(*y*) *Costigan v. Hastler*, 2 Scho. 1740. *Gross v. Chilton*, 25 April, and Lef. 160. 166. 1 Mad. 11. 1782, before Lord Thurlow. *Usborne v. Usborne*, Dick. 75. See also *Lord Mansfield v. Hamilton*, 2 Scho. and Lef. 28. (*a*) *Hampton v. Hodges*, 8 Ves.

(*z*) *Farrant v. Lovel*, 3 Atk. 723. 105. *Hopkins v. Monk*, A. D. 1742. (*b*) *Buckley v. Buckley*, 1 Term Uvedale v. Uvedale, 7 March, Rep. 647.

A covenant in a mortgage deed for repayment of the money is a contract within the 3 Jac. I. c. 8. So that a mortgagor cannot take out a writ of error upon a judgment had thereupon without first perfecting bail, according to that statute. (c)

A mortgagor levying a fine, and continuing in possession, cannot bar the mortgagee by non-claim. (d).

It has been already observed, that the fine of the mortgagee shall not bar the mortgagor. (e) To which we may here add, that if the mortgagee is disseised, and a fine is levied by the disseisor, and five years pass after the proclamations, and afterwards the mortgagor pays or tenders the money, he shall, under the second saving of the statute 4 Hen. 7., have five years after his payment or tender, for his title first accrued to him after the proclamations, by the payment or tender, upon cause or matter before the proclamations, *viz.* by the condition made before the fine. (f)

Where upon a mortgage transaction the mortgagor gives a power of attorney to effectuate any part of the security, such power, contrary to powers of attorney in general, is irrevocable by the act of the party. (g) But by the act of God it may be revoked, as if the mortgagor should die. (h)

By the 7 and 8 Will. 3. c. 25. s. 7. it is enacted, that a mortgagor in possession may vote in elections for county members, notwithstanding the mortgage.

And from the converse of the 9 Ann. c. 5. s. 4. it follows that a mortgagor is eligible to serve in parliament, though the lands may be mortgaged to their full value,

(c) *Buckney v. Metham*, 3 Taunt. 383.

(e) *Supra*, Chap. on Mortgagees.

(f) *Plow.* 373. 2 West. Symb.

(d) *Holland v. Hatton*, Carth. 68 b.

414. *Focus v. Salisbury*, Hardr.

(g) *Walsh v. Whitcomb*, 2 Esp.

402. 2 Ves. 482. 1 Vent. 82. 1 565.

*Lev.* 272. 3 Term Rep. 173.

(h) See 2 Mer. 514.

unless the mortgagee shall have been seven years in possession. (i)

Under the statute 4 Geo. 2. c. 28. s. 6. a mortgagor who has a reversion in him may renew ecclesiastical leases without a surrender of the mortgage term.

But then, in all cases of ecclesiastical leases, where a reversion is left in the mortgagor, the mortgage deed should contain a covenant on the part of the mortgagor, that he will renew ; and that the renewed term shall be granted to the mortgagee for securing the money. Otherwise the mortgagee, while he puts it in the power of the mortgagor to renew without his joining, leaves it open to argument, that by taking a *partial* interest only in the present term, he has precluded himself from claiming any interest in any renewed term. But the disadvantage of taking a mortgage by underlease, in any instance, of what are generally called renewable leaseholds, has been already pointed out in the Chapter on Mortgagees.

There are many cases to which the general order of the 8th of May, 1794, does not extend. (k) In these cases, however, the assignee of a bankrupt mortgagor may dispose of the estate by selling the premises subject to the mortgage. And if there be any doubt of the sum really due upon the security, and the mortgagee refuses to join, the assignees may request the commissioners to call him before them, which they have power to do, and to examine him with respect to the principal and interest due. (l)

If an estate, seised under an extent on an inquisition, be sold under an order of the Court of Exchequer, subject to a mortgage, the purchaser cannot afterwards pay off the mortgagee without his consent, or its being referred to

(i) See 2 Bro. C. C. 271.

(l) 2 Christian's Bank. Laws,

(k) See Supra, Chap. on Mort. 323, 324. 1 Mad. 39. note.

gagees.



the Deputy Remembrancer to see what is due. At the same time, in strictness, no order for sale of a crown debtor's estate subject to a mortgage should be made, without notice of the motion for such an order first given to the mortgagee. (*m*)

Lord Thurlow has intimated his opinion, that if a receiver be appointed by the Court upon the application of a mortgagee, and he afterwards embezzle or otherwise waste the rents and profits, the loss must fall on the mortgagor. (*n*)

A mortgage of turnpike tolls is within the statute of mortmain, 9 Geo. 2. c. 36. (*o*)

By the 9 Ann. c. 14. all mortgages or other securities given for money won by gaming, or by betting on the sides or hands of such as do game, or for repaying money lent for gaming or betting, are declared absolutely void. And it has been decided that a bill will lie for the discovery of the consideration of any security alleged to be given for money lost at play, and to have it delivered up; (*p*) as well as for the repayment of any money actually paid upon any such security. (*q*)

If an improvident heir take up goods at an extravagant price, and mortgages to secure it, he may be relieved so far as it stands as a security for the unjust gain: but after it is determined upon a quantum meruit what was the real worth of the goods, the mortgage will still be binding upon the heir for so much as is found by the verdict. (*r*)

(*m*) *The King v. Coombes*, 1 519. *Andrews v. Berry*, 3 Austr. Price, 207. *The King v. De la* 634.

*Motte, Forest. Ex. Rep.* 162.

(*q*) *Rawden v. Shadwell*, Amb.

(*n*) *Rigge v. Bowater*, 3 Bro. 269. *Baker v. Williams*, there cited.

*C. C.* 365. (*o*) *Knapp v. Williams*, 4 Ves. 430. note. 2 Bos. and Pull. 223.

(*r*) *Freeman v. Bishop*, 2 Atk. 39. S. C. *Barnard. C. R.* 15.

(*p*) *Newman v. Franco*, 2 Austr.

A pauper mortgagor gains a settlement by possession : but then he must be in possession as mortgagor. For where a mortgaged estate descended upon a pauper, and then the mortgagee recovered possession by ejectment, and allowed the pauper to reside on the premises for the purpose of overlooking some repairs, it was held that such possession did not gain a settlement, for he had neither *jus in re* nor *ad rem*. (s) So, where a pauper conveyed two houses to trustees to sell, and pay his debts, and the surplus to him, it was held that he had gained no settlement ; for the estate was not substantially his property, he had only a chance of a residue. But there was a stronger ground, for the possession had been gained by fraud. (t) In a subsequent case it was said that the better ground for the decision in *Rex v. St. Michael's, Bath*, was the fraudulent possession ; and the Court held that a conveyance upon trust to sell, to secure 10*l.*, like a mortgage, would not prevent a pauper from acquiring a settlement. (u)

The statute 9 Geo. 1. c. 7. enacts that no person shall gain a settlement by virtue of any purchase of any estate whereof the consideration doth not amount to 30*l.* *bonâ fide* paid. From this it appears, that the purchaser must sometime or other be in the possession of 30*l.*, which he employs in paying for the purchase. Therefore, if a pauper contracts for the purchase of an estate for 39*l.*, which is at the time subject to a mortgage to another person for 32*l.*, and having paid 7*l.* takes the conveyance, subject to the mortgage ; (x) or if he contract for the purchase of an estate for 52*l.*, and pays only 12*l.*, but mortgages the property to the vendor for the residue ; in either case he

(s) *Rex v. The Inhabitants of* 288. As to *Rex v. Tarrant, Launceston*, 3 Term R. 771. *ceston*, 3 East, 225, see *Sergeant*

(t) *Rex v. St. Michael's, Bath*, *Frere's note*, Doug. 632. Doug. 630. 4th edit.

(x) *Rex v. Mattingley*, 2 Term

(u) *Rex v. Edington*, 1 East, Rep. 12.

will not gain a settlement. (*y*) And yet, if after such purchase he gets B., an indifferent person, to lend him the money, and with that money pays off the mortgage, and takes an assignment of the security, so as to vest the legal estate in him, and then mortgages the estate to B., and continues in possession for forty days after, the pauper by such purchase becomes entitled to a settlement. (*z*) For if he can gain credit for 30*l.*, the Court will not enquire from whence it comes. (*a*)

At law a mortgage is attended with all the consequences of an alienation ; and though equity relieves against the forfeiture of the condition upon payment of the debt, yet it does it upon its own terms ; wherefore there are many legal consequences incident to a mortgage, in which it refuses to interfere. This observation we shall find to prevail throughout the whole doctrine of mortgages.

Thus, a mortgage works a severance of a joint-tenancy ; and equity will not relieve in favour of the survivorship, because a joint-tenancy is a thing odious in equity. (*b*)

Again, if an administrator mortgages a term of the intestate's, and makes A. his executor and dies, the equity of redemption shall not go to the administrator *de bonis non* of the intestate, but to A., the executor of the first administrator ; because at law the mortgage was an alienation of the whole term, and the administrator was not possessed in *auter droit*, but in his own right. (*c*)

So, it seems, that if a husband mortgage a term to which he is entitled in right of his wife, with a proviso that the mortgage shall be void on payment, and afterwards the condition is forfeited, and then the husband dies,

(*y*) *Rex v. Olney*, 1 Maul. and Selw. 387.

(*z*) *Rex v. Chailey*, 6 Term Rep. 755. *Rex v. Olney*, 1 Maul. and Selw. 387. *Rex v. Tedford*, Burr. Sett. Ca. 57.

(*a*) *Rex v. Tedford*, Burr. Sett. Ca. 57. 1 Maul. & Selw. 390, 391.

(*b*) *York v. Stone*, 1 Salk. 158. S. C. 1 Eq. Ca. Abr. 293. pl. 1.

(*c*) *Butler v. Bernard*, 1 Cha. Ca. 224. S. C. 2 Freem. 139.

living the wife, the term shall go to the executor of the husband. *(d)* But in this case, if the money had been paid according to the condition, all things would have been in *statu quo*; and, consequently, the wife surviving would have been entitled to her term. *(e)* Where, however, the mortgage proviso declares that on payment the term shall be assigned to the husband, his executors or administrators, it is an absolute alienation from the beginning; and there is no room for contending that the wife surviving shall be entitled, though the money be paid at the day. *(f)*

And again, if one seised of copyhold, *ex parte materná*, surrender to a mortgagee in fee, who is admitted, and afterwards resurrenders, it is like the case of a feoffment and refoffment, and will alter the course of descent. *(g)*

A conveyance by a trader of all his estate and effects, by way of mortgage, though for securing a sum of money not one-sixth of the value of the property, is an act of bankruptcy, and will make the mortgage void. *(h)*

So an outstanding mortgage in fee will, upon principle, support contingent remainders, and prevent an equitable tenant for life, *viz.* a tenant for life of the equity of redemption, from destroying them; though, as has been observed by Mr. Butler, no case on that point has yet been decided. *(i)*

At law a mortgage is a total revocation of a voluntary deed: but in equity it shall be a revocation *pro tanto* only. *(k)* And this, though the mortgage be made to a person claiming under the voluntary settlement. *(l)*

In like manner, if A. devises his estate, and afterwards

*(d)* Watts v. Thomas, 2 P. Wms. 364. But see 1 Rolle's Abr. 344. G. pl. 15. *contrà*.

*(e)* 2 P. Wms. 365.

*(f)* See Talbot's Argument, 2 P. Wms. 365

*(g)* Doe dem. Harman v. Morgan, 7 Term Rep. 103.

*(h)* Hassel v. Simpson, 1 Bro. C. C. 99. Doug. 89. Cooke's Bank. Laws, 99. 7th edit.

*(i)* Fearn's Cont. Rem. 321. 6th edit.

*(k)* Rand v. Cartwright, 1 Cha. Ca. 59. Perkins v. Walker, 1 Vern. 97.

*(l)* Thorne v. Thorne, 1 Vern. 182.

mortgages it in fee, it is a total revocation at law : but in equity it is a revocation *pro tanto* only. (*m*)

For some time it was considered that a mortgage to the devisee would, even in equity, operate as a revocation : (*n*) but now the rule is established otherwise. (*o*)

A conveyance upon trust to sell, to raise money for the payment of debts, being made for a particular purpose, is considered, like a mortgage, a revocation *pro tanto* only of a former will. (*p*)

But the rule in all these instances, it is evident, is collected entirely from the intention : for if it appear that the mortgagor or grantor had any other intention beyond that of letting in a charge on the estate, the mortgage in fee or conveyance would, even in equity, be construed a revocation of the will. (*q*) As if, in a conveyance in trust to sell, instead of declaring the ultimate trust for the grantor, (*r*) it was declared that the trustees should convey *to such uses and purposes as he by deed or will should appoint, and for default of appointment to himself in fee* ; it must be held to be a revocation. Because by this means the estate assumes a new modification, and is disposable in a different manner from that which the testator formerly devised. (*s*)

Lord Cowper is reported to have said, that if a man de-

(*m*) 1 Atk. 606. Hall v. Dench, 1 Vern. 329. 342. Perkins v. Walker, 1 Vern. 97. Lord Bridge-water v. Duke of Bolton, 2 Lord Raym. 968. S. C. 3 Salk. 315. Vawser v. Jeffery, 3 Barn. & Ald. 462. 17 Ves. 133, 134. Jackson v. Parker, Amb. 687.

(*n*) Harkness v. Bailey, Cha. Prec. 514 ; but see 5 Ves. 661.

(*o*) Peach v. Phillips, 2 Dick. 538. Baxter v. Dyer, 5 Ves. 656.

(*p*) Vernon v. Jones, Cha. Prec. 32. S. C. 2 Freem. 117. Ogle v.

Cook, cited 2 Bro. C. C. 592. Earl Temple v. Duchess of Chandos, 3 Ves. 685. Parsons v. Freeman, Amb. 118.

(*q*) Kenyon v. Sutton, cited 2 Ves. Jun. 601. 8 Ves. 281. Tickner v. Tickner, cited 3 Atk. 742. Amb. 117. 1 Wils. 308. Fitzgerald v. Fauconberge, Fitzg. 207. Earl of Lincoln v. Roll, Show. Par. Ca. 154. Harmond v. Oglander, 6 Ves. 199. 219, *et seq.* S. C. 8 Ves. 126.

(*r*) 2 P. Wms. 718. 16 Ves. 367.

(*s*) See the cases cited in note (*q*).

vises lands in fee, and afterwards mortgages the same for a term of years, and then levies a fine *sur cognizance de droit come ceo*, &c., and not a fine *sur concessit*, this will be a revocation: but if there had been a fine *sur concessit*, it had revoked only *pro tanto*. (*t*) But it should seem that at this day a mortgage for years and fine *sur cognizance de droit come ceo*, &c. would not of themselves be a revocation of a prior will. (*u*)

But a mortgage in fee and fine *sur cognizance de droit come ceo*, &c., has always been allowed to be a revocation *pro tanto* only, because that is the usual species of fine for passing estates in fee. (*v*)

And if a mortgagor, where the mortgage is in fee, devises the mortgaged premises, and afterwards pays off the mortgage, and the mortgagee conveys the legal estate either to the mortgagor himself or to a trustee for him, such conveyance of the legal estate does not in equity operate as a revocation of the will. (*w*)

As the Court has restricted the legal operation of a fine, when levied to effectuate a mortgage, to a revocation *pro tanto* only, of a former devise, so it will relieve against the legal operation of a fine, levied for the purpose of letting in a mortgage only, in extinguishing rights which were not intended to be barred. As where a feme covert entitled to a jointure annuity has joined her husband in a mortgage by fine, and it has appeared that the agreement of the parties was not to extinguish the annuity, the Court has decreed the annuity to the wife. (*x*)

(*t*) Pasch. 6 Ann. Canc. 8 Vin. Abr. 136. pl. 10.

(*u*) See Corbett v. Barker, 1 Anst. 138. S. C. 3 Anst. 755. See also 3 Atk. 805. 1 Rob. on Wills, 293, *n*.

(*v*) 2 P. Wms. 334. Luther v. Kirby, 8 Vin. 148. pl. 30. 3 P. Wms. 169, *n*. Lady Vernon v. Jones, 2 Freem. 117. Cha. Prec. 32.

(*w*) Doe dem. Gibbons v. Pott, Doug. 710. Serjt. Williams' note, 1 Saund. 277. (*c*). And see 1 Roberts on Wills, 276.

(*x*) Solly v. Whitfield, Rep. temp. Finch. 277. See also Anon. Skin. 238. S. C. *nom*. Brend v. Brend, 1 Vern. 213. S. C. 2 Cha. Ca. 98. 161. S. C. cited 1 Bligh. 115.

But as to the barring of a married woman of her right in lands, other means besides that of a fine have been deemed effectual. For an answer by husband and wife to a bill of foreclosure will prevent the wife from questioning the validity of the mortgage after her husband's decease, unless she was imposed upon; for an answer in equity has been adjudged equal to a fine. (*y*)

So where a husband and wife granted a lease by way of mortgage, and the feme after her husband's decease had directed the tenants in possession to attorn to the mortgagee, had accounted with him for interest, and had not questioned his possession for a number of years, the Court of King's Bench held that, although the deed was originally void, yet that these acts were equivalent to a re-delivery of it, and confirmed the mortgage. (*z*)

But to return to the effect of a mortgage upon the previous estate of the parties.

On mortgages by husband and wife a question has frequently arisen, how far the mortgage deed and fine have altered the estate of the parties. Upon which point the rule as now settled is, that where there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of an ambiguity, that there is a resulting trust for the benefit of that person who would have been entitled to the estate if the mortgage deed had not been made. (*a*)

Thus, where husband and wife joint-tenants for life, with remainder to the heirs of the husband, joined in a mortgage in fee, with a proviso that on repayment by the husband and wife, or the heirs of the husband, it should be lawful for them to re-enter and enjoy as in their former

(*y*) Anon. Mosl. 218.

(*a*) 1 Bligh. 114, 115. 126, 127.

(*z*) Goodright v. Strapham, Cowp. Lewis v. Nangle, 1 Cox, 240.

201. Doug. 53. n. 17.

estate; and it was declared that all fines to be levied by the parties should be to the use of the husband and his heirs (leaving out the wife) with a further declaration that all fines to be levied within seven years should be to the uses before expressed, and to no other use, intent, or purpose; afterwards and within the seven years a fine was levied according to the indenture, the husband being dead the wife, on the day appointed, paid the money. And it was resolved by all the court that the wife should have the land for her life, for so is the condition; and the first part of the clause, and the other part or middle clause, is not repugnant, but stands well with it that it shall be to the use of Baron and his heirs, and does not controul the limitation to the feme for her life. (*b*)

So, where a wife having a jointure of 100*l.* per annum in some houses, joined her husband in a demise and fine *sur concesscrunt* for securing a sum of money, and a deed was executed between the conusee and the husband, wherein the equity of redemption was limited to the husband and his heirs, but the wife was no party to this deed; upon a question whether the jointress or the heir of the wife should redeem, the Lord Chancellor Nottingham decreed it to the wife; which decree was afterwards affirmed by Lord Keeper North, who observed that the wife being a jointress, and having granted a term for years only out of her estate for life, there rests a reversion in her which naturally attracts the redemption. (*c*)

So, where husband and wife, being seized in right of the wife, mortgaged for one thousand years, with a covenant to levy a fine to the mortgagee and his heirs; and the equity of redemption was reserved to the husband and

(*b*) Southcoat v. Manory, Cro. Eliz. 744. tered as Anon. Skin. 338. S. C. 1 Eq. Ca. Abr. 62. S. C. cited 1

(*c*) Brend v. Brend, 1 Vern. 213. Bligh. 115.  
S. C. 2 Cha. Ca. 98. 161. S. C. en-



wife and their heirs; the mortgage being forfeited, the husband and wife conveyed away the equity of redemption by lease and release to an assignee of the mortgagee, and declared that all fines, &c. should be to the sole use of the relessee in fee. The wife died, and then the husband. Upon a bill brought by the heir at law of the wife to be let into a redemption of the whole estate, it was contended on behalf of the defendant that the bill could only reach one half of the estate; for as the fine saved the equity of redemption to the husband and wife, and their heirs; one half was, therefore, vested in him, and passed to the defendant. But the heir of the wife was let in to redeem. In the same case Thompson Baron declared that it has often been ruled that a reservation of this kind, in a fine, levied completely *diverso intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel; not even if it had been to the husband and his heirs only. (d)

The case thus put by Baron Thompson occurred precisely in *Ruscombe v. Hare*.(e) A husband having two mortgages on his estate, devised it to his wife, and died. The wife joined her second husband in another mortgage of the estate, consolidating the two former mortgages into one, at a different rate of interest, and reserving the equity of redemption to the husband and his heirs. But there was neither recital nor circumstance to shew that it was the intention of the parties to make a new settlement of the estate. The second husband, after the death of his wife, dealt with the property as his own; disposed of part for a valuable consideration; and died. Upon which the heir at law of the wife brought his bill against the purchaser, the representatives of the husband and the mortgagee, to redeem. And it was decreed accordingly.

(d) *Corbett v. Barker*, 1 Anstr. *Huntingdon v. Countess of Huntingdon*, 2 Vern. 437. 1 Bligh, 119.

(e) 6 Dow. 1. See also *Earl of*

In the above cases we may observe that the construction has always been in favour of the wife: but the principle upon which they were decided would be extended against the wife, if the equity of redemption were reserved to her in a more beneficial manner than she would otherwise have been entitled, unless an agreement appeared that that was the intent of the parties.

Thus, (*f*) where a husband tenant in tail, together with his wife by lease and release and fine, conveyed to a mortgagee in fee, with a proviso that if the husband and wife, their heirs, executors, administrators, or assigns, should pay the mortgage money and interest, the estate should be reconveyed to the husband and wife, their heirs or assigns; and there was a clause at the end of the deed, which declared the uses of the fine to be (subject to the payment of the mortgage money and interest) to the husband, his heirs and assigns. The husband afterwards made his will, devising all his lands to be sold; and afterwards died, leaving the wife surviving. Upon a bill brought by claimants under the will, after the death of the wife, to have the trusts established, it was objected that the husband, being a joint-tenant (which could only have been under the proviso in the mortgage deed) could not devise. But Sir Thomas Sewell, M.R. after time for consideration, gave his opinion that the wife, at the time of the mortgage, had no interest, but a mere possibility of dower. The husband had the whole interest in the estate, saying that it had been supposed that there was a contract between the husband and wife, by which she gave up her right of dower, and was to have the chance of the whole equity of redemption in case she survived her husband. This, in his opinion, was a very unnatural supposition. If it had been so, it would have been recited in the deed. That her right of dower accounted

for her joining in the fine. The deed was planned as between mortgagor and mortgagee. That the wife had a right to redeem; and if she had redeemed, a court of equity would not have taken the estate from her, but upon the terms of allowing her dower. This being a mere equitable interest, the deed has declared the rights of the parties. The uses of the fine are declared after payment of the mortgage money to the husband and his heirs. She would then be entitled to dower again, after the money was paid by the husband taking the estate. And, in confirmation of this doctrine, he referred to the cases of *Southcoat v. Manory*, *Brend v. Brend*, and *Lord and Lady Huntingdon*, above cited, and *Pocock v. Lee*, mentioned in the sequel of this Work.

It appears almost needless to observe that in all cases of a mortgage by husband and wife, where it is intended, being the husband's estate, to bar the wife of dower, in favour of the husband, or being the wife's estate, to vest the equity of redemption in the husband only, the covenant to levy a fine should be prefaced by a recital declaratory of this ulterior intention of the parties.

But an agreement or intention to alter the nature of the estate may be gathered from other circumstances independent of recital. For if it appears upon the face of the deed, that, the mortgage, and the limitation of the estate, have been the distinct consideration of the parties, and there is no ambiguity, all presumption grounded upon fraud or mistake ceases; and, therefore, the equity of redemption must follow the declaration in the deed. As if an estate be mortgaged with a proviso that on redemption it shall be reconveyed to the husband and wife for their lives, and the life of the survivor, with remainder to the use of the right heirs of the survivor. (g) Here is a settlement

(g) *Jackson v. Innis*, 1 Bligh. versed in *D. P. Rowel v. Whalley*, 104. S. C. 16 Ves. 356. But re- 1 Cha. Rep. 116. S. C. 1 Bligh. 118.

of the estate independent of and unconnected with the mortgage; and, consequently, the rules respecting resulting trusts do not apply. And this is no more than consonant with other cases connected with the law of mortgages. As if one devise an estate, and then mortgage it, it is a revocation *pro tanto*: but if subject to the mortgage the estate be limited to such uses as he shall appoint, it is a total revocation, because he has manifested an intention that the estate shall assume a different disposable quality. (*h*) So in the case of powers, of which we are next to speak.

Mr. Powell states that where a mortgage is made under a power to be void on payment of the mortgage money, it seems to leave the equity of redemption in the same condition in which the estate was previous to the mortgage, that is, under the like circumstances, so that the equity of redemption will correspond with the title before the mortgage. (*i*) To which we may add that the effect of a mortgage under a power would be no more than this, though the agreement was that upon payment it should be reconveyed to the mortgagor and his heirs or executors. (*k*) Which is warranted not only as has been observed by tradition, (*l*) but by the analogy of those cases which have determined that a mortgage is a revocation *pro tanto* only of a former will. (*m*) The arguments, in either case, stand upon the same ground; and the presumption in favour of the devisee, under the prior will, or of the persons entitled to the estate subject to the power, may be rebutted by the mortgagor limiting the estate subject to the mortgage to uses inconsistent with such a limited intention of

Lewis v. Nangle, Amb. 150. S. C. 1 Cox 240. S. C. cited 1 Bligh 122.

(*h*) Harmond v. Oglander, 6 Ves. 219, 220; and see *supra*.

(*i*) Pow. on Mort. 346.

(*k*) 16 Ves. 367. 2 P. Wms. 718.

(*l*) 16 Ves. 367. Per Lord Chancellor Eldon.

(*m*) Hall v. Dench, and other cases, cited *supra*, in this Chapter. Sugd. on Pow. 272; and ante Chap.

2, sec. 1.

letting in the mortgage only. As in *Fitzgerald v. Fauconberge*, (*n*) where the settlor, under a general power of revocation, conveyed to trustees to raise and pay debts, and after payment thereof, to pay the overplus, and reconvey the estates unsold, to him or to such persons, &c. as he should by any deed or writing under his hand and seal, attested by two or more credible witnesses appoint: and by a deed of even date he reserved power to revoke the conveyance. It was determined the former settlement was wholly revoked.

#### OF AN EQUITY OF REDEMPTION.

We come now to speak of an equity of redemption. This, which according to the strict sense of the words means no more than the power which the mortgagor has in equity to redeem after the condition forfeited at law, is applied also to the substance; and in this sense it signifies the interest which the mortgagor, in a court of equity, has in the lands mortgaged after the forfeiture of the condition.

The most natural division of the subject will be, to consider an equity of redemption, First, As applied to the substance or the interest of the mortgagor in the lands after the condition forfeited. Secondly, As applied to the power or the means by which the right of redemption may be prosecuted, and by whom. And, Thirdly, As applied both to the substance and power, or how this equity of redemption may be lost.

As to the *First*: The interest of the mortgagor in the lands mortgaged after the condition forfeited, while it sub-

(*n*) *Fitzg.* 207.

sists, is a regular equitable estate, and considered with respect to the mortgagor and all other persons, except the mortgagee, may be treated as a trust estate; so much so, that there are few of the rules of law, applicable to trusts, which are not also applicable to an equity of redemption. And even the mortgagee, while this equity subsists, is considered only a trustee for the mortgagor for all purposes, except his claim for principal, interest, and costs.

An equity of redemption, therefore, may be conveyed away to a purchaser or otherwise, and by the same conveyances as any other trust-estate. (*o*)

It follows that it may be mortgaged. But the mortgage of an equity of redemption, which is usually called a second mortgage, is seldom recommended by conveyancers, for two reasons:—First, Because a third mortgagee without notice may, by paying off the first mortgage, acquire a preference over the second. Secondly, Because great difficulties may arise in calling in the money; for, as a second mortgagee has no legal remedy, he is driven to the tedious and expensive process of a suit in equity to recover even his interest. There is, however, one case where a second mortgage may be accepted; that is, where a term for years prior to the first mortgage can be procured; for the acquisition of such a term will give the second mortgagee the legal estate, and compel the first mortgagee to become plaintiff in equity. (*p*)

An equity of redemption may be devised by a will, executed according to the statute of frauds. (*q*)

Indeed, a devise by the mortgagor after the mortgage, and before the condition forfeited, will carry the equity of redemption: and this is proved not only by the case of

(*o*) Roscarick v. Barton, 1 Cha. Ca. 217. Hard. 469.

(*q*) Philips v. Hele, 1 Cha. Rep. 101. Anon. 2 Ch. Ca. 8. 3 Atk.

(*p*) 2 Cru. Dig. 126, 1st edit. 151. 6 Cru. Dig. 73.

Moor et Ux. v. Hawkes, (*r*) and Roe v. Jones, (*s*) which have settled that a possibility coupled with an interest, and descendible to the heir, may be devised before the contingency happens; (*t*) but also by those cases which have settled that lands mortgaged in fee may pass by a devise made before any mortgage was made at all. (*u*)

With respect to copyhold lands, the rule till very lately stood thus:—if the mortgagee had not been admitted, it was held that a mortgagor might devise those lands, without any previous surrender, to the use of his will; (*x*) but if the mortgagee had not been admitted, it was held that, in order to pass those lands, it was necessary that they should be surrendered to the use of the mortgagor's will; (*y*) because, in the former case, the mortgagor's interest was only equitable, which might be devised without any surrender; but in the latter it was not so, since the mortgagor, till the admittance of the mortgagee, remains legal tenant to the lord. The necessity, however, of a previous surrender of copyholds to the use of a will, in any case, is now done away with by the 55 Geo. 3. c. 192.

A devisee of an equity of redemption is not an assignee of all the estate, right, title, and interest of the mortgagor, against whom an action of covenant, as such, may be maintained. “But,” said Lord Ellenborough, C. J. “it does not, however, follow from what has been laid down, that the plaintiffs,” *i. e.* the devisees of the equity of redemption, “are remediless, in respect to the injury they may

(*r*) Cited 1 Hen. Blackst. 33, other case cited ante in this Chap.  
34. (*x*) King v. King, 3 P. Wms.

(*s*) 1 H. Blackst. 30. S. C. on 358.  
Error, 3 Term Rep. 88. (*y*) Kenebel v. Scrafton, 8 Ves.

(*t*) See Fearne's Cont. Rem. 364 30. Doe dem. Shewen v. Wroot,  
to 371. 6th edit. 5 East, 132. Floyd v. Aldridge,

(*u*) Hall v. Dench, and the cited 5 East, 137.

have sustained : it is competent to them, in part, to redress their own injury, by abating the nuisance which has been erected to the prejudice of their possessory rights. And although that privity of legal estate may be wanting, which will enable them to charge the defendants as assignees in an action of covenant ; they may still in an action upon the case, if the facts will warrant it, recover against the defendants, as strangers and wrong doers, a compensation for any prejudice done to the exercise and enjoyment of such legal rights as the plaintiffs may be entitled to claim and exercise, and have heretofore enjoyed under the deed in question : or they may maintain an action on the covenant against the personal representative of the covenantor, if such personal representative can be discovered.” (z)

An equity of redemption is descendible in the same manner as a trust estate ; and in copyhold lands will follow the custom, as to the legal estate ; in borough English, will descend to the youngest son ; and, in gavelkind, to all the sons alike. (a)

By the better opinion, supported by a case cited by Mr. Fazakerley before Lord Chancellor Hardwicke, there may be a *possessio fratris* of an equity of redemption. (b)

So, no doubt, an equity of redemption descended to a daughter may be held to be divested in favour of a posthumous son. At law, indeed, it has been held by eight judges against the opinions of four, that if a mortgagor die, leaving a daughter and his wife enseint with a son, and the daughter at the day pays the money, that she shall retain

(z) The Mayor, &c. of Carlisle v. Blamire, 8 East, 487. and see Wilson v. Kuubley, 7 East, 128.

(a) Fawcett v. Lowther, 2 Ves. 304.

(b) Penville v. Luscomb, 1 Atk. 604. cited also 1 Bro. C. C. 327. Powell on Mortg. Vol. I. 381. refers to Co. Lit. 14 b. 1 Co. 124 b. Plow. 58.



the lands, as against a posthumous son. (c) But then this decision proceeded entirely upon the legal principle, that if the daughter had not performed the condition at the day, the land would have been lost, both to her and the after-born son : which is a principle that would not at present be allowed in a court of equity. Still, however, as Mr. Powell presumes, the question to whom the land shall in such case belong may be referred to the degree of pressure under which money so circumstanced is paid. For if a daughter so predicamented should pay money due upon mortgage to prevent an actual *foreclosure*, and to save the inheritance should satisfy the condition on the point of being forfeited in equity as well as at law, there seems great reason to contend that a son born after should not divest it, because if the daughter had not performed the condition, the land had been utterly lost, and *qui sentit onus sentire debet et commodum*. (d)

As to escheat, how far an equity of redemption is subject to that, the same doubt which hangs over that doctrine of the law, as applied to a trust, hangs over it also as applied to an equity of redemption ; for it has never yet been determined whether there can be an escheat, of a trust, or an equity of redemption. (e)

But it is quite certain that there may be a forfeiture to the crown of an equity of redemption. (f)

An equity of redemption is entailable, which entail is barable by the same means as an entail in trust estates. (g)

(c) Kirton's case, Cro. Car. 87.

(f) Lovell's case, D. P. 1 Salk.

(d) Powell on Mortg. Vol. II. 369.

85. 1 Eden, 210. Lutwich's case, 2 Atk. 223.

(e) Per Lord Hardwicke, 2 Ves.

304. Burgess v. Wheate, 1 Blackst. 123. 1 Eden, 255, 256.

(g) Hard. 469. Roscarriek v. Barton, 1 Cha. Ca. 217. 1 Atk. 605.

An equity of redemption upon a mortgage in fee is not subject to dower ; (*h*) but it is to curtesy. (*i*)

As against the heir a widow is entitled to dower out of the equity of redemption of a mortgage for a term of years, because a term of years will not prevent the husband from having the legal seisin of the freehold and inheritance ; (*k*) this is like the case of an attendant term for years, which will not protect the heir from the dower of the widow. (*l*) But as against a purchaser who has paid off the mortgage, and taken an assignment of the mortgage term to attend, the widow is not entitled to dower. (*m*)

Where a mortgagee for a term of years contracted to purchase the equity of redemption for the mortgage sum only : upon a bill brought for dower, the Master of the Rolls said the dowress should have dower out of a term for years, where the inheritance was in the husband, as against the heir of the husband, or against a volunteer : but it is settled that she shall not as against a purchaser for a valuable consideration. But in the principal case he could not look upon the defendant as a purchaser, because he could not look upon the method there taken between him and the husband as a purchase, the agreement for the purchase being for the mortgage money only. He therefore relieved the widow ; but said, that he would

(*h*) *Dixon v. Saville*, 1 Bro. C. C. last and next notes.

325. : but see post in this Chap.

(*m*) *Swannock v. Lifford*, Amb.

(*i*) *Casborne v. Scarfe and Inglis*, 1 Atk. 603. and see *Hearle v. Greenbank*, 1 Ves. 298.

6. on appeal from the Rolls. Lord Hardwicke's Judgment, much fuller stated by Mr. Butler, in his note to Co. Lit. 208 a. *Radnor v. Vandebendy*, Show, P. C. 69. S. C. Cha. Prec. 65. *Brown v. Gibbs*, Cha. Prec. 97. *Wynn v. Williams*, 5 Ves. 130. Case of a Mortgagee, who is purchaser *pro tanto*.

(*k*) *Palmes v. Danby*, Cha. Prec. 137. 2 P. Wms. 716. *Wray v. Williams*, Cha. Prec. 151. S. C. 1 P. Wms. 137.

(*l*) *Dudley v. Dudley*, Cha. Prec. 211. and see the cases cited in the

not relieve her as against a purchaser. (*n*) The ground for relief in the case just cited was evidently, because the Master of the Rolls considered the mortgagee a volunteer only as to the purchase of the equity of redemption. It, therefore, seems to result, that in every case of the purchase of an equity of redemption, where the consideration money does not exceed the money due upon the mortgage, unless a purchaser can be furnished with the most satisfactory evidence that he has given a *bonâ fide* consideration for the purchase of the equity of redemption, he cannot be advised to complete without a fine from the vendor's wife.

And in every case of a purchase, where the purchaser relies upon a mortgage term as a protection from dower, it is absolutely necessary that the mortgage term should be assigned to a trustee for the purchaser. (*o*) Moreover, in every case where it is said that a mortgage prevents the widow from claiming dower, whether it be spoken with reference to the equity of redemption on a mortgage in fee, or on a mortgage for years, assigned in trust for a purchaser, it is intended of a mortgage made before the title of dower in the wife. (*p*)

The way in which a widow becomes entitled to dower, where there is a mortgage for years in the one case, and does not in the other, is this ; *i. e.* as against the heir or a volunteer, and in favour of the widow, equity will set aside the term, upon her keeping down one-third of the interest of the principal. But in questions between a widow and a purchaser equity stands nenter, and allows the pur-

(*n*) *Mitchell v. Reynolds*, at the Rolls, 1730. stated in Mr. Butler's note, Co. Lit. 208 a. note 1.—See also *Morley v. Elways*, 1 Cha. Ca. 107. *Hill v. Worsley*, Hard. 320. preceding notes ; and Co. Lit. 208 a. note 1. *Maundrell v. Maundrell*, 10 Ves. 246. particularly the close of the Judgment.

(*p*) See as in last note, particularly Co. Lit. 208 a. note 1.

(*o*) See the cases cited in the four

chaser the protection of his term ; for in both cases the widow may recover dower at law with a *cesset executio* during the term. (*q*)

Indeed, we shall find that in most cases, where a person can claim title by act of law in a trust estate, he may also claim a title in an equity of redemption. Thus, it will go to the assignees of a bankrupt; (*r*) or, being in a term of years, to the husband surviving his wife. (*s*) For though it is true that a mortgagee is not barely a trustee to the mortgagor; (*t*) yet to some purposes, videlicet, with regard to the inheritance he certainly is, till a foreclosure. (*u*)

Where an act of parliament mentions a seisin only, it applies to a seisin in equity or a trust estate, and consequently to an equity of redemption as well as to a legal estate ; which has been recognized even by a court of law. And, therefore, an equity of redemption has, in more than one decision, been held to be within the exception of the last annuity act 17 Geo. 3. c. 26. s. 8. which provided that annuities secured on lands of equal or greater value, whereof the grantor was seized in fee simple or fee tail in possession, need not be enrolled. (*x*) Which decisions are equally applicable to the present annuity act since the 8th section of the 17 Geo. 3. has been re-enacted therein. Under the old act Lord Thurlow held that the act not having said that it should be above reprises, an equity of redemption would be within the exception, though mortgaged for its whole value. (*y*) But the present act, *i. e.*

(*q*) See as in the last note.

(*r*) 1 Cha. Ca. 71.

(*s*) Young v. Radford, Hob. 3.

(*t*) 17 Ves. 133. And see post.

as to assets and execution.

(*u*) 1 Atk. 606.

(*x*) Shapnell v. Vernon, 2 Bro.

Cha. Ca. 268. Tucker v. Thurston,

17 Ves. 131. Cumming v. Sir W.

Twysden, 12 East. 272. n. Amhurst

v. Skynner, 12 East. 263.

(*y*) 2 Bro. C. C. 271. 17 Ves.

133.

53 Geo. 3. c. 141. is, in this respect, more explicit; and has expressly declared that the value to the grantor must be of equal or greater annual value than the annuity granted, over and above any other annuity and the interest of any principal sum charged or secured thereon, of which the grantee has notice at the time of the grant.

It seems that any agreement relating to the mortgage money is within the statute of frauds as an agreement relating to money, which is a charge upon lands; and that, therefore, parol evidence will not be admissible as to any agreement between co-mortgagors to charge the lands otherwise than those lands would be affected in equity. Thus where an estate was settled upon A. in tail, remainder to B. in tail; and A. proposed to B. to join in a mortgage, which was accordingly done, and they both joined in a bond, but A., being first named, received the money: Upon a bill brought by the creditors of A., after his death, to turn the mortgage debt and interest upon the estate of B., insisting upon a particular agreement between A. and B. that this debt should be on the estate of B., which was objected to by B., as improper evidence within the statute of frauds, because only parol, Lord Hardwicke observed, that "as to the parol evidence it is not necessary to give an absolute opinion, but I doubt whether it would be good. This is certainly a kind of real right; being to affect a real estate in all events, contrary to the writing, and to rebut the equity." And, taking the evidence in its greatest extent, the weight thereof is taken off and contradicted by the evidence on the other side, by which it is plain that A. was taken both by himself and B. to be the debtor; so that the facts subsequent and concomitant speak the contrary to any actual agreement to this purpose: this is, therefore, an attempt by persons standing in the place of the principal to turn the estate of the surety to exonerate the debt of the principal. (z)

(z) *Robinson v. Gce*, 1 Ves. 251. See *Lee v. Rook*, Moz. 318.

The distinction between legal and equitable assets consists chiefly in their administration; for legal assets shall be administered amongst creditors in the course of law, wherein the king's debt shall be first paid. 2dly, Judgments against the testator in a court of record, whether obtained upon trial or by mere confession, and amongst many judgment creditors, he who first sues execution must be preferred. 3dly, Statutes and recognizances, and herein where there is more than one creditor by statute he who first gets hold of the goods shall be preferred: but, as touching the lands, they shall claim precedence according to the priority of their incumbrances. 4thly, Specialty creditors. And, 5thly, Creditors by simple contract. (a) But equitable assets are administered, first among the real security creditors, and then among the creditors by specialty and simple contract; the real securities, whether they be by mortgage, judgment, statute, or recognizance, being paid according to the priority of their respective dates, for in equity there is no preference amongst these securities; and the creditors by specialty and simple contract being paid *pari passu*, without any distinction as to priority. (b)

An equity of redemption is sometimes legal assets, and sometimes equitable. If a man seized in fee mortgage in fee, (c) or if one possessed of a term mortgage for the whole term, (d) in either case, the equity of redemption is considered equitable assets. But if one seized in fee mortgage for a term of years only, (e) the reversion out-

- (a) Wentw. Off. of Exec. c. 12. Wilson v. Fielding, 2 Vern. 763.  
 pa. 129. Treat. on Equity, Part II. (c) Plunket v. Penson, 2 Atk:  
 Ch. 2 s. 2. 2 Blackst. Com. 511. 290. Solley v. Gower, 2 Vern. 61.  
 (b) Treat. on Equity, Book IV. (d) Barthrop v. West, 2 Cha.  
 Part II. c. 2. s. 1. Child v. Ste- Rep. 33. Creditors of Sir Charles  
 phens, 1 Vern. 101. Symmes v. Sy- Cox, 3 P. Wms. 341. Hartwell v.  
 monds, 1 Bro. P. C. 66. Sharpe v. Chitters, Amb. 308.  
 Earl of Scarborough, 4 Ves. 538. (e) Massam v. Harding, cited 2  
 Tempest v. Sabine, cited 4 Ves. 541. Atk. 291. 294. Cole v. Warden, 1  
 Plunket v. Penson, 2 Atk. 290. Vern. 410; and see 1 Salk. 354.

standing is legal assets, and will draw the equity of redemption to it; for a creditor may attach the reversion in a court of law, where the judgment will be with a *cesset executio* till the reversion falls into possession, and then file a bill in equity to redeem the mortgage; which will entitle him to tack his debt by judgment to the mortgage debt, as against the heir, but not as against other creditors. (*f*)

If an executor redeem a mortgage of a term for years, the value of the property beyond what was paid for redemption shall be legal assets in his hands; (*g*) for whatever comes to the executor, *qua executor*, shall be legal assets, though recovered in Chancery.

Where a mortgagor devised to trustees for a term for the payment of debts, and died indebted, by judgment, bond, and simple contract, it was held that the judgment creditors, who had a right to redeem, should be preferred, (*h*) which we may observe is only consonant to the rules above laid down for the distribution of equitable assets. Nor is the above case at all inconsistent with the case of Sir C. Cox's creditors, where bond and simple contract creditors were decreed to be paid *pari passu*. (*i*)

In 1673 it was made a question whether the money, which came to the hands of the heir for the sale of the equity of redemption, was assets in equity; and it was held by Finch, Lord Keeper, that it was not any more than the land after alienation *bonâ fide*. (*k*) But this was prior to the 3 W. & M. c. 14. by which it is enacted that the heir shall be chargeable to the value of the lands sold,

(*f*) 2 Cru. Dig. 140; and see the cases in the last note.

(*g*) Harwood v. Wraynam, 1 Rol. Abr. 920. S. C. Moore, 858. 1 Rol. Rep. 56. 1 Brownl. 76. 3 Cox's P. Wms. 343. n. 2.

(*h*) Sharpe v. Earl of Scarborough, 4 Ves. 538. Stonehewer v. Thompson, 2 Atk. 440.

(*i*) 3 P. Wms. 341.; cited ante, 4 Ves. 542.

(*k*) 1 Freem. 303. pl. 369.

though the lands in the hands of a purchaser *bonâ fide* before action brought shall not.

The 10th section of the statute of frauds has enacted that the sheriff may deliver execution of all such estates as any person is seized or possessed of in trust for him against whom execution is so sued. But the equity of redemption of a mortgage of a term for years, (*l*) or the equitable interest of a termor, who has conveyed in trust to sell and pay creditors, and the surplus to himself, (*m*) cannot be taken in execution under this statute.

In *Lyster v. Dolland*, (*n*) Lord Thurlow, at first, thought that an equity of redemption was within the statute of frauds. But the next day he decided otherwise, saying, "That upon looking into the statute he did not think this is within it. The words are, that upon every statute, recognizance, or judgment, the sheriff shall deliver in execution to the party any lands, &c. held in trust for the defendant, just as if he had been actually seised or possessed of the same. Here it is impossible he can be seized. Upon reading the statute I thought we were all mistaken yesterday. I do not think the statute touches it at all. I imagined the words were much larger; and that the words 'equitable interests' were contained in it." From this judgment it appears that Lord Thurlow drew no distinction between the cases, whether the equity of redemption were on a mortgage in fee, or on one made by a termor; and consequently that, in his opinion, the equity of redemption, on a mortgage in fee, could not be taken in execution.

In a late case in the exchequer it was made a question whether an equity of redemption could be taken under an

(*l*) *Lyster v. Dolland*, 1 Ves. Jun. 431. S.C. 3 Bro. C.C. 478. (*m*) *Scott v. Scholey*, 8 East. 467. *Metcalf v. Scholey*, 2 New Rep. 461. *Burden v. Kennedy*, 3 Atk. 739. (*n*) 1 Ves Jun. 435, 436.



extent for a debt to the crown: (o) but in a still later case the point seems settled that it may. (p) And no doubt the rule laid down by Hale, with respect to trust estates, that they are liable to the king's debt by the common law *per cursum scaccarii*, which makes the law in such cases, (q) would be equally extended to an equity of redemption.

A trust estate of inheritance not being liable to forfeiture for felony, (r) it follows that the equity of redemption on a mortgage, made by the person seised, of the inheritance, would not be forfeited for felony.

But an equity of redemption is liable to forfeiture for treason, (s) under the statute 33 Hen. 8. c. 20. s. 2. And the ground for this, as stated by Mr. Saunders, is that the statute of treasons, above noticed, has the word conditions; so that if a mortgage in fee be made subject to a condition of re-entry, and the mortgagor commits treason before the day of payment, the king, by the forfeiture, shall have the benefit of the condition; and if the estate shall become absolute in the mortgagee in consequence of the non-payment of the mortgage money, an equity attaches upon the mortgagee in favour of the crown, upon the same principle that it would have attached in favour of the mortgagor in case he had not committed treason. (t)

(o) The King v. De la Motte, Hardr. 488.

Forest. Exch. Rep. 162.

(s) Attorney-General v. Crofts,

(p) The King v. Coombes, 1 Price 207.

1 Bro. P. C. 222. Lovel's case, 1 Salk. 85.

(q) Hardr. 495.

(t) 1 Saunders on Uses and Trusts,

(r) Attorney-General v. Sands, 223.

*Secondly:* Who may redeem, and the method of prosecuting this power of redemption.

Equity permits every person to redeem who has any estate or interest in the equity of redemption of the mortgagor.

Therefore, all persons of the profits, as the mortgagor, a tenant for life, a remainder-man or reversioner, (*u*) a tenant by the curtesy, (*x*) a dowress, (*y*) a jointress, (*z*) the crown or its grantee, (*a*) an executor, an heir, a devisee, (*b*) a purchaser, whether for a valuable consideration (*c*) or voluntary; and if voluntary, whether under a settlement made before the mortgage, (*d*) (in which case the mortgage is a revocation *pro tanto*,) or after, (*e*) a lessee by himself or his friend, (*f*) &c. may redeem. And Lord Manners was of opinion that under the Irish act of the 8 Geo. 1. c. 2. where a tenant mortgagor has forfeited his lease, that the original landlord might be permitted to redeem. (*g*) So, assignees of a bankrupt may redeem; (*h*) but by the 5 Geo. 2. c. 30. s. 38. they are prevented from instituting a suit in equity for that purpose, without the consent

(*u*) *Aynsly v. Reed*, Dick. 249. 190.

(*x*) *Bunb.* 347. 1 Anstr. 143.

(*c*) *Anon.* 3 Atk. 313.

(*y*) *Palmer v. Danby*, Cha. Prec. 137. *Wray v. Williams*, *ibid.* 151.

(*d*) *Thorne v. Thorne*, 1 Vern. 182. *Rand v. Cartwright*, 1 Cha.

(*z*) *Howard v. Harris*, 1 Vern. 33. 190. S. C. 2 Cha. Ca. 147. 2

Ca. 59. *Barthrop v. West*, 2 Cha. Rep. 62.

*Ventr.* 364. *Bertue v. Stile*, cited 1 Cha. Ca. 271.

(*e*) *Roberts on Vol. and Fraud. Conveyances*, 373.

(*a*) *Attorney-General v. Crofts*, 1 Bro. P. C. 222. *Lovell's case*,

(*f*) *Keech v. Hall*, Doug. 22.

1 Salk. 85. 1 Eden, 210. *Attorney-General v. Bassett*, Park. 268.

(*g*) 1 Ball and Beat. 34, 35.

(*h*) *Franklyn v. Fern*, Barnard. Ch. R. 30.

(*b*) *Philips v. Hele*, 1 Cha. Rep.

of the major part in value of the creditors. And a Protestant, next of kin, has been admitted to redeem a mortgage made by a Popish heir, and to hold till his conformity. (*i*) Committees of a lunatic may out of the savings of the estate redeem a mortgage, in which case it will be for the benefit of the heir and the mortgage term assigned to attend. (*k*) In like manner a guardian may, out of the profits of an estate descended to the infant, pay the interest of any real incumbrance and the principal of a mortgage, because that is a direct and immediate charge upon the land, but not the principal of any other real incumbrance. (*l*)

And not only the persons of the profits, but all subsequent incumbrancers, may redeem ; as a subsequent mortgagee, (*m*) a tenant by statute merchant, statute staple, or elegit, (*n*) sequestrators, (*o*) &c. So a judgment creditor, though his judgment be with stay of execution : (*p*) but if it be a mortgage of leasehold, it is necessary, before he brings a bill to redeem, that a writ of execution should be sued out ; for, until that be done, a judgment is no lien on the leasehold estate. (*q*) So a creditor, whose debt subsists only in equity, as a widow to whom the husband before marriage has given a bond, conditioned to leave her a sum of money if she survived him, may redeem. (*r*)

But in general, in order to entitle a person to redeem, it is necessary to shew that he has the estate of the mort-

(*i*) *Jones v. Meredith*, Com. 661.  
S. C. Bunb. 346. As to what that conformity must be, see Butler's note, Co. Lit. 391 a.

(*k*) *Ex parte Grimstone*, Amb. 706.

(*l*) *Palmes v. Danby*, Cha. Prec. 137.

(*m*) 1 Ves. 268.

(*n*) Bunb. 317.

(*o*) *Fawcet v. Fothergill*, Dick. 20.

(*p*) *Stonehewer v. Thompson*, 2 Atk. 400.

(*q*) *Shirley v. Watts*, 3 Atk. 200. *Angell v. Draper*, 1 Vern.

399.

(*r*) *Acton v. Pierce*, 2 Vern. 480.

gagor. Therefore, where there are proper persons to get in the estate of another, as an executor, or the assignees of a bankrupt, a court of equity will not suffer the creditors of a testator, or the creditors of a bankrupt, to bring a bill in order to get in that estate. But if an executor or assignees under a commission will collude with a debtor, there is no doubt a creditor may bring his bill in order to take care of the estate, and charge the assignees or executors with such collusion. Therefore, where the assignees of a bankrupt were prevented from bringing a bill to redeem by a resolution of the creditors, it was determined that if assignees refuse to bring a bill that is for the benefit of the bankrupt's estate, any creditor has a right to bring such bill under peril of costs. In which case it is necessary that the plaintiff creditor should make the assignees defendants. And the decree will be, that the assignees in the first place, and in default thereof the plaintiff, shall have liberty to redeem. (s) By the same rule, creditors under a deed of trust cannot have a decree to redeem, unless they can shew that the trustees are colluding, or that they are unsafe. (t) So a bankrupt mortgagor cannot bring a bill to redeem : but where he has a clear interest, and the assignees refuse, the Lord Chancellor, upon petition, would compel them, upon an offer of indemnity, to let him use their names. (u)

And not only must the person coming to redeem shew that he has the legal estate of the mortgagor, but he must shew that he has, next to the mortgagee, the best right to the possession of the estate ; for instance, a remainderman cannot redeem during the life of the tenant for life, unless the tenant for life refuses to redeem ; (x) wherefore,

(s) *Franklyn v. Fern, Barnard.* 583.

*Cha. Rep.* 30.

(u) *5 Ves.* 587.

(t) *Troughton v. Binkes,* 6 *Ves.*

(x) *Gilb. Eq. Rep.* 69.

573. *Spragg v. Binkes,* 5 *Ves.*

in all bills for redemption by a remainder-man, he must make the tenant for life a defendant, in the same manner as a creditor coming to redeem must make an executor or assignees under a commission of bankruptcy defendants. (y) And where the equity of redemption is limited to a variety of uses, the several beneficiaries will have the option of redeeming in the order of limitation in which they stand. (z) And this power of the remainder-man to redeem is highly equitable; since otherwise, by the tenant for life leaving the interest to run in arrear, the estate might come highly encumbered to the remainder-man, or be entirely lost. (a) Yet, though a remainder-man cannot directly compel the tenant for life to redeem; yet indirectly he may, by first purchasing or himself redeeming the mortgage, and then taking possession of the premises, or filing a bill of foreclosure. (b) This rule enabling the remainder-man alone to redeem, after the tenant for life has refused, is a consequence of the rule which has latterly prevailed in the courts, that a tenant for life shall keep down the interest only of a mortgage; for formerly the remainder-man might have compelled the tenant for life to come in and contribute his share of the principal towards a redemption. (c)

Where there are several mortgages of the same estate, one behind another, the order in which the mortgagees will be let in to redeem will be, that the second do redeem the first, the third the second, and so on. (d)

(y) Barnard. Cha. Rep. 32, 33. 223. Cornish v. Mew, *ibid.* 271.

(z) Aynsly v. Reed, Dick. 249, 250. Barnard. C. R. 33. Clyatt v. Batteson, 1 Vern. 404. Ballett v. Spranger, Cha. Prec. 62.

(a) Casborne v. Scarfe, 1 Atk. 606. (d) Arcedechne v. Bowes, 3 Mer. 216. in note. S. C. 3 Anstr. 752.

(b) Gilb. Eq. Rep. 62. 3 Anstr. 757. Romilly argu. but not reported there as to this point.

(c) Hayes v. Hayes, 1 Cha. Ca.

The person coming to redeem must shew a legal title. Therefore, where a person claiming under the heir general, brought a bill to redeem, the defendant set forth a deed of entail entitling another person to the equity of redemption, upon which the plaintiff prayed that he might redeem at his peril; the Lord Keeper would not admit him to do it, unless he could make out that the estate tail was docked. And a trial at law was directed for that purpose. (e)

A subsequent incumbrancer should always give notice of his incumbrance to the mortgagee; or he puts it in the power of the mortgagee to increase his original debt, by tacking to it another debt. (f) But more especially is this notice requisite, where the subsequent incumbrancer has any idea of redeeming the mortgage; for if a mortgagee, without notice, purchase the equity of redemption from the mortgagor, the subsequent incumbrancer is for ever afterwards barred from redeeming. (g)

Where, however, a mortgagee forecloses, a subsequent incumbrancer, not a party to the suit, may nevertheless redeem, though the decree of foreclosure be signed and inrolled. (h) And there is a material difference between this case and the preceding; for the former is of an actual purchase completed and covered by the mortgage, which cannot be impeached but by a creditor, of whom the purchaser had notice: the latter supposes only a decree for a foreclosure, which cannot affect a subsequent incumbrancer as to his right of redemption. (i) But a subsequent incumbrancer, whose incumbrance was not created

(e) *Lomax v. Bird*, 1 Vern. 182. Raithby's edition.

(f) *Goddard v. Complin*, 1 Cha. Ca. 119. and see post.

(g) *Greswold v. Masham*, 2 Cha. Ca. 170.

(h) *Godfrey v. Chadwell*, 2 Vern.

601. *Morrett v. Westerne*, 2 Vern. 663. *Crisp v. Heath*, 7 Vin. 52. pl. 2.—See post, where these cases are cited.

(i) *Powell on Mortg.* Vol. I. 361.

till after the suit commenced for foreclosure, cannot be let in to redeem, but will be bound by the decree obtained against the mortgagor or his representatives. (*k*)

A person cannot file a bill in equity, and yet stay the redemption till the validity of the mortgage has been tried at law: but he must at once declare whether he will redeem. (*l*)

If one mortgages his estate in order to raise money for another on a promise of repayment, he may afterwards go into equity against that other person to have his estate disencumbered, as every surety may against his principal; and the promise for repayment having been by parol only will not avail the defendant: but if there be any doubt as to the sum actually received by the defendant, the court will direct an indebitatus assumpsit to be brought at law, and will prevent the defendant from taking advantage of the statute of limitations. (*m*)

It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought to be parties to the suit, plaintiffs or defendants, however numerous they may be. (*n*) Hence upon a bill for redemption it is necessary that there should be proper persons to give an effectual release for the debt, and to reconvey the estate; and that there should be proper persons to whom the estate may be reconveyed: and, therefore, both the real and personal representative (*o*) of the mortgagee ought to be parties.

(*k*) *Bishop of Winchester v. Payne*, 11 Ves. 194.

(*m*) *Lee v. Rook*, Mos. 318.

(*l*) *Smith v. Valence*, 1 Cha. Rep. edit.

(*n*) *Mitford's Plead.* 144. 2nd

169: but see *Palmer v. Jackson*, 5 Bro. P. C. 194. 205.

(*o*) 2 Freem. 52. Case 57.

But, on a bill to redeem an old Welch mortgage, the Court does not look for the personal representative to be made a party. And the rule, it seems, would be the same in the case of a recent Welch mortgage. (*p*) So, if the mortgagee has assigned the mortgage without the mortgagor's consent, it will be enough if the last assignee is made a party: (*q*) much more so if the assignment were with the mortgagor's consent. And again, if the mortgagee has conveyed the estate over to uses in settlement, it is not necessary that the mortgagor should make all the persons, who have an interest under the settlement, parties: but he must at least bring the first tenant in tail before the Court; (*r*) because with his assistance the estate may be reconveyed discharged of the limitations over, and he is the person to give a receipt for the principal mortgage money. Of course it follows that all persons having limitations under the settlement prior to the first tenant in tail, must be parties also. (*s*)

We have already seen a remainder-man coming to redeem must make the tenant for life a party; a creditor under a commission of bankrupt, the assignees; a creditor of a testator, the executor; because their right of redemption is prior. So, a second mortgagee, or a subsequent incumbrancer, cannot come into equity to redeem without making the mortgagor, or his heir, if it be a mortgage by a person seised in fee, a party. For the natural decree, in such cases, is, that the second mortgagee shall redeem the first mortgagee; and that the mortgagor shall redeem him, or stand foreclosed; and there never was a decree which was

(*p*) 1 Ves. 406.

237. 2 Atk. 101. 1 Cha. Ca.

(*q*) Hill v. Adams, 2 Atk. 39.

220.

9 Ves. 268, 269. Call v. Mortimer, cited post.

Anon. 2 Eq. Ca.

Abr. 594. pl. 3. 2 Freem. 59.

(*s*) Blount v. Earl of Winterton, MSS. Harr. Cha. Prac. 29. Ed.

1808. 1 Dow. 31.

(*r*) Yates v. Hambly, 2 Atk.



not so perfected. (t) So much so that a subsequent incumbrancer cannot have a bill to redeem *only*, without bringing the mortgagor before the Court. (u) But though, on a bill brought by a subsequent incumbrancer to redeem the first, it is necessary that the real representative of the mortgagor should be a party, there is no necessity to make the personal representative also a party; and it was so held by Lord Thurlow in *Fell v. Brown*. (x) The reason for which is this, because the bill, so far as relates to the mortgagor, being to foreclose the equity, the plaintiff need only make him a party who has the equity, *viz.* the heir. (y) And if the heir be out of the jurisdiction of the Court, the Court will not proceed without him. (z) So if, upon the death of a mortgagor, part of the mortgaged estate descends to A. and the residue to B.; and afterwards an incumbrancer claiming under A. only brings a bill to redeem. As it is settled that a subsequent mortgagee must redeem the entire mortgage of a prior mortgagee, the subsequent incumbrancer must not only make A. a party to the bill, but also B. And the right to redeem gives him a right to bring B. before the Court. (a)

A devisee of a mortgaged estate bringing a bill to redeem need not make the heir at law of the mortgagor a party, unless his bill be also to have the will established. (b)

Under a bill for sale the Court will not decree a redemption, though there may be ground for a redemption. (c) But if a bill for sale states a proper case for redemption, under the general prayer for relief, the Court will allow

(t) *Fell v. Brown*, 2 Bro. Cha. P. Wms. 333. n.  
 Ca. 276. *Woodcock v. Mayne*, cited 12 Ves. 59.; and see 3 P. Wms. 333. note A. *Wilson v. Metcalfe*, 3 Mad. 45.  
 (u) 12 Ves. 58.  
 (x) *Ubi supra*.  
 (y) *Duncombe v. Hansley*, 3  
 (z) *Fell v. Brown*, 2 Bro. Cha. Ca. 276. Case cited by Mr. Scott, 2 Bro. Cha. Ca. 277.  
 (a) *Palk v. Clinton*, 12 Ves. 48.  
 (b) *Lewis v. Nangle*, 2 Ves. 431.  
 (c) *Troughton v. Binkes*, 6 Ves.

the plaintiff to amend generally by adding parties, and praying a redemption or foreclosure in the alternative. (*d*)

On a bill to redeem the mortgagee cannot object that the bill does not state a valid legal conveyance to him; for by the bill the mortgagor has admitted the title of the defendant to be good, and a mortgage is properly the subject of equitable cognizance. (*e*)

It is settled that a mortgagor coming to redeem must pay the costs of all persons parties to the suit, and claiming under the mortgagee, though it is apparent that by this means the mortgagee has it in his power, by settling the estate or otherwise, very much to increase the expences of the mortgagor. (*f*)

A mortgagee, as we have already seen, may recover the estate by ejectment, or bring a bill for foreclosure without giving any previous notice to the mortgagor. The reason is, because at law the estate is his own; and no notice is requisite to entitle a man to recover his own, who stands in the situation of the mortgagee, so that whenever the mortgagee calls for his money the mortgagor must pay it. But it is otherwise with the mortgagor; for he cannot compel the mortgagee to take his money at a moment's warning. He must give the mortgagee six months' notice to recover it; or, which is the same thing, must pay him six months' interest in advance; because the day of redemption at law being past, he has lost his estate at law, and can be let in to redeem by a court of equity only; and a court of equity will not assist unless he will do equity: and the Court holds that it is equitable that the mortgagor shall give six months' notice of paying in the money, to enable the mortgagee to provide another security for it. (*g*)

(*d*) *Palk v. Clinton*, 12 Ves. 48. 255.; and see ante in Chap. on

(*e*) *Roberts v. Clayton*, 3 Anst. Mortgagees, as to costs.

715.

(*g*) Second Volume of Cases and

(*f*) *Wetherell v. Collins*, 3 Mad. Opinions, 51.; and see post this

But as the plaintiff, in a bill for redemption, professes that the money is ready, the Court will not enlarge the time for payment on a bill for redemption, as it will on a bill for foreclosure. (*h*)

It is a rule in equity that a mortgagee in possession, who is sued for a redemption, shall never be stripped of his possession before payment. (*i*) And where possession is got against a mortgagee by fraud pending a suit, it must be restored before there can be any redemption. (*k*) And the Court will not allow a purchaser of the equity of redemption to oblige a mortgagee to quit possession, unless he will first pay him his principal, interest, and costs. (*l*)

Upon a bill filed to redeem a mortgage of some chambers in Gray's Inn, it was insisted for the defendant, that the chambers mortgaged, being in an inn of Court, where the students were to enjoy quiet without disturbance, the plaintiffs ought to apply to the bench; and, if not redressed there, then to the judges of the society; but that the Courts at Westminster had been always pleased to decline interposing therein; and the rather for that the legal estate of all the chambers of the house was in trustees; and the order of pension, which granted terms in chambers, passed no legal title, nor were the benchers that made such order seized of the legal estate. But the Master of the Rolls allowed the bill to be proper, declaring that he would not have meddled with this title to chambers, which is no legal one, if the benchers themselves had not recommended it to the plaintiffs to come hither, and left them at liberty to make this application. (*m*)

opinion stated at length. 2 Ves.  
678.

(*h*) *Nevosielski v. Wakefield*, 17  
Ves. 417.

(*i*) *Vin. Abr. title Mortg. T.*  
pl. 15. *Brine v. Hartpole*.

(*k*) *Lant v. Crisp*, *Vin. Abr. tit.*  
*Mortg. T.* pl. 16.

(*l*) *Davy v. Barker*, 2 *Atk.* 2.

(*m*) *Rakestraw v. Brewer*, 2 *P.*

*Wms.* 511. *S. C. Sel. Cha. Ca.* 55.

Upon a bill brought to redeem against a mortgagee, who was then ambassador in Spain, the Court ordered all proceedings to delay for a year and a day, unless the ambassador should return sooner. (*n*)

Upon bills to redeem a variety of questions frequently arise as to the mortgage money, interest, costs, the method of accounting, tacking, &c.: but for questions of this kind referring the reader to those parts of this Work, wherein they are more particularly considered, we will, in the next place, proceed to enquire, according to the plan originally marked out, how this equity of redemption, of which we have been speaking, may be entirely lost.

Thirdly. The most decided way, in which a mortgagor's equity of redemption in the mortgaged premises may be lost, is by a decree in a court of equity, which decree is made either upon the suit of the mortgagee in a bill of foreclosure, or upon the suit of the mortgagor in a bill for redemption. For the decree in a bill for redemption always is, that the mortgagor shall redeem the mortgagee, or stand foreclosed. (*o*) So, where a plaintiff seeks to set aside a conveyance for inadequacy, or as having been fraudulently obtained, the like decree will be made to redeem, or be foreclosed. (*p*) And it is established now, that if a bill, filed by a mortgagor for redemption, is dismissed, the money not being paid at the time, that operates as a foreclosure, and is equivalent to a decree for foreclosure. (*q*) So, wherever a mortgagee is made a party to a bill, though the prayer of the bill may be simply for relief; yet, it will be considered the same thing as a bill to redeem, for re-

(*n*) *Pilkington v. Stanhope*, 2 Bro. C. C. 278. 12 Ves. 58, 59. Vern. 317.

(*p*) Co'. of *Sutherland v. North-*

(*o*) See the decrees in Co'. of more, Dick. 56.

*Sutherland v. Northmore*, Dick. 56.

(*q*) 11 Ves. 199.

*Aynsly v. Reed*, Dick. 249.; and 2

demption is the proper relief. And if after the master's report the mortgagor neglects to redeem the mortgagee, the Court will, at his application, dismiss the bill as against him, which is equivalent to decreeing a foreclosure. (r) And a decree dismissing a bill for redemption will operate equally in favour of the mortgagee against any person to whom the mortgagor may, during the pendency of that suit, convey, as against the mortgagor himself. (s) And if, upon a bill to redeem, the money be not paid at the day appointed, upon affidavit of attendance at the time and place appointed, it is a motion, of course, to dismiss the bill, which will be with costs. (t) But the dismissal of a bill for want of prosecution will not prevent the mortgagor from filing a second bill to redeem; in which a dismissal for want of prosecution is distinguishable from a dismissal for non-payment of the mortgage money at the day appointed. (u)

Another method, by which the mortgagor's equity of redemption may be entirely lost, is by the mortgagee's taking possession of the mortgaged premises, and continuing in the quiet and uninterrupted possession of them for twenty years, without any steps taken by the mortgagor to redeem, and without any act done by the mortgagee to shew that he considered the mortgage as subsisting.

From this position it appears that in order to bar the mortgagor's right of redemption by the method, of which we are now speaking, it is necessary,—

First, That the mortgagee should take possession of the estate; for if a mortgagor continues in possession, no length of time will bar the equity of redemption. And

(r) *Cholmley v. Countess of Oxford*, 2 Atk. 267.

(t) *Stuart v. Worrall*, 1 Bro. C. C. 581.

(s) *Garth v. Ward*, 2 Atk. 246.

(u) 18 Ves. 460.

even a possession by the mortgagor of a part of the mortgaged premises will preserve the right to redeem the whole ; for part the mortgagor may redeem as being in possession, and part he cannot separately ; so he may the whole. (x)

And the nature of this possession so taken by the mortgagee, in order to avail him any thing, must be an adverse possession ; otherwise no presumption arises in his favour. (y) And, therefore, in the case of a Welch mortgage, where the profits are taken in lieu of the interest, where the mortgagee is always let into possession, and where the mortgagor is at liberty to redeem at any time, no continuance of possession in the mortgagee can bar the mortgagor's equity of redemption ; for, by the very terms of the agreement, there is an everlasting subsisting right of redemption which cannot be forfeited even at law. (z) So if a person be let into the possession of an estate to hold till out of the rents and profits he shall have received payment of his debt, which is a *vivum vadium*, in contradistinction to *mortuum vadium*, or mortgage ; (a) or if a transaction, originally a mortgage, be turned into a *vivum vadium* by an agreement that the mortgagee shall enter and hold till payment, (b) no length of possession will oust the mortgagor's right of redemption. Yet, both in the case of a *vivum vadium* and a Welch mortgage, it has been laid down that the equity of redemption may be barred, if the mortgagee continues in possession twenty years after the money has been paid off. (c) Which, it is presumed, could be spoken only of a

(x) *Rakestraw v. Brewer*, Sel. 1 P. Wms. 291.  
 Cha. Ca. 55. S. C. Mosl. 189. S. C. (a) *Yates v. Hambly*, 2 Atk.  
 2 P. Wms. 511. 359.  
 (y) 1 Mer. 125. (b) *Orde v. Heming*, 1 Vern.  
 (z) *Howell v. Price*, Gilb. Eq. 418.  
 R. 106, S. C. Cha. Prec. 423. S. C. (c) 2 Atk. 362. 1 Mer. 125.

payment by the mortgagor, had not Lord Hardwicke said that "after the account taken, if it should appear that the mortgage was satisfied by perception of profits twenty years ago, and that the mortgagee has continued in possession ever since the statute of limitations will run." (*d*) So it appears, that no length of possession will bar the equity of redemption where the mortgage money is payable on demand, unless it can be proved that the mortgagee has continued in possession twenty years after demand made. (*e*)

Cases of fraud form an exception to every rule ; and, therefore, if the mortgagee has been guilty of any fraud in throwing in words to clog the redemption ; (*f*) or has prevented the mortgagor from redeeming by fraud, oppression, or imposition ; (*g*) no length of possession will gain him an absolute title.

Secondly. The possession of the mortgagee must continue for the space of twenty years. Now, although mortgages are not within the statute of limitations, (*h*) yet, because it would be extremely difficult for a mortgagee, who has been long in possession, to make out an account of the profits he has received, the Court of Chancery has determined, in analogy to the statute of limitations, that twenty years shall be the time to bar a mortgagor of his equity of redemption. (*i*)

But as the Court of Chancery has fixed upon this period of twenty years in analogy to the statute of limitations ; so it has kept up the analogy to the same statute, in holding that the 20 years shall not operate to the prejudice of the

(*d*) In *Yates v. Hambly*, 2 Atk. 363. A case of *vivum vadium*.

(*e*) *Hartpole v. Walsh*, 4 Bro. P. C. 369.

(*f*) *Ord v. Smith*, Sel. Cha. Ca. 9. S. C. 2 Eq. Ca. Abr. 600.

(*g*) *Spurgeon v. Collier*, 1 Eden. 55.

(*h*) 21 Jac. 1. c. 16.

(*i*) *Jenner v. Tracey*, and *Belch v. Harvey*, 3 P. Wms. 287. note.

Anon. 3 Atk. 313. *White v. Ewer*, 2 Ventr. 340.

mortgagor if he can account for his neglect by reason of imprisonment, infancy, or coverture, or by having been beyond sea; and not by having absconded, which is an avoiding or retarding of justice. (*k*) And therefore, where a husband and wife mortgaged the wife's land, and the mortgagee took possession, and twenty-five years afterwards the heir of the wife brought a bill to redeem, the Court decreed a redemption on account of the disability of the wife. (*l*)

But if the time once begins to run, it must run on; and no intervention of a legal disability in the person entitled to redeem will prevent the twenty years from running. Thus, where a mortgagee recovered possession under a decree of foreclosure in 1701. The mortgagor died in 1702, leaving an infant heir, who continued an infant till 1709, and in 1721 brought his bill to redeem. The Lord Chancellor dismissed the bill, saying, "that the infancy of the plaintiff would not help him, the right to redeem not beginning in his time, but in his ancestor's; and in all such cases the party was barred, and had not ten years after the impediment was removed." (*m*) So if a feme covert mortgagor becomes afterwards discoverd, the twenty years will run on from that time; and, though she should marry again, it will run on during the second marriage. (*n*) In like manner if a feme sole mortgages, and then takes husband and dies, the tenancy by the curtesy will not prevent the twenty years from running on against the heir of the wife, for the heir might have redeemed notwithstanding the estate of the tenant by curtesy; and it is of no consequence to the mortgagee who

(*k*) *Jenner v. Tracey, and Belch v. Harvey*, 3 P. Wms. 287. note. R. 185. *Knowles v. Spence*, Mosl. 225. S. C. 1 Eq. Ca. Abr. 315. St.

(*l*) *Corvel v. Sykes*, 1 Cha. Rep. 193. John v. Turner, 2 Vern. 418.

(*n*) *Anon.* 2 Atk. 333.

(*m*) *Floyd v. Mansell*, Gilb. Eq.



has the equity of redemption, if they do not make use of that right: they shall be barred. (o)

But if the mortgagee purchase the estate of the tenant by the curtesy, the heir will be admitted to redeem, though the mortgagee may have been twenty years in possession; because in this case he unites in himself two characters, and must be considered as having discharged the duties of each. As a purchaser of the tenancy by the curtesy, it was his duty to keep down the interest of the mortgage; as mortgagee, he was to receive it. And though in general cases a presumption arises that the equity of redemption is relinquished where there is no payment of surplus rents, or account delivered within twenty years, such a presumption cannot arise where the same person is both to pay and to receive. (p)

Hitherto the analogy between the statute of limitations and the determinations respecting an equity of redemption has been found to be perfect, *viz.* that the time to bar the mortgagor shall be twenty years; that an impediment in the person entitled to redeem shall prevent its running on; and that, when once it does begin to run, no subsequent disability will prevent its running on. But the similitude holds good also in another respect; for as the Court has not thought proper to exceed twenty years where there is no disability, in imitation of the first clause of the statute of limitations; so, after the disability removed, the time fixed by the proviso for prosecuting, which is ten years, ought in like manner to be observed: (q) for the impediment having been removed, ten years is a bar to the redemption.

Thirdly. It is necessary that the possession of the mort-

(o) Anon. 2 Atk. 333. Corbett v. 138. See also Innes v. Jackson, Barker, 1 Anstr. 138. 16 Ves. 356. 371.

(p) Corbett v. Barker, 3 Anstr. (q) Belch v. Harvey, 3 P. Wms. 755. which overruled S. C. 1 Anstr. 287. note B. 17 Ves. 99.

gagee should be quiet and uninterrupted, without any steps taken by the mortgagor to redeem; and, therefore, a redemption was decreed upon a bill, though the mortgagee had been forty-seven years in possession, it appearing that the title of the mortgagee had been litigated by the parties in five different ejectments, and only seventeen years had elapsed from the time of the last ejectment brought. (r) Yet though the mortgagor bring his bill to redeem, and obtain a decree to redeem and account, it is further necessary that he should prosecute his bill with effect within twenty years from the decree; for if the mortgagee be afterwards allowed to remain in possession for twenty years, the time will again run on. (s) And, generally, whenever any act has taken place, which keeps the redemption on foot, a fresh period of twenty years begins to run on, during which a mortgagee remaining in quiet possession may acquire the absolute title to the estate. (t)

Fourthly. The presumption arising in favour of the mortgagee by length of possession may be rebutted by any act done by him acknowledging the existence of the mortgage, or referring his possession to his title as mortgagee. Thus, though a mortgagee has been fifty years in possession, yet if there has been an account with the mortgagor within the last twenty, a redemption will be decreed. (u) But an account delivered in by a receiver or manager of the estate under the mortgagee, without any authority from the mortgagee, will not save the equity of redemption to the mortgagor. (x) Nor will a mere demand of an account by the mortgagor, without process or any acknowledgment on the part of the mortgagee, pre-

(r) *Palmer v. Jackson*, 5 Bro. P. C. 194.

(s) *St. John v. Turner*, 2 Vern. 418.

(t) 1 Ves. and Bea. 539.

(u) *Procter v. Cowper*, 2 Vern. 377. *Anon.* 2 Atk. 333.

(x) *Barrow v. Martin*, Coop. Cha. Ca. 189.

vent the effect of the length of possession in the mortgagee. (y) But, in order to keep the redemption open, it is not necessary that there should be an acknowledgment arising out of some transaction directly between mortgagor and mortgagee. For it has been decided that a mere private account kept by the mortgagee of the profits of the estate, in which he treats it as redeemable, is a sufficient circumstance whereon to decree a redemption. (z) And Lord Loughborough mentions a case where an estate came to two different hands: the part in the hands of one family was held irredeemable; as to the other part a redemption was decreed after a vast number of years, for the mortgagee had kept accounts. At the same time it should be noticed, that the Chancellor thought there had been a devise of it as a mortgage. (a) Any private account, however, kept by the mortgagee, will not be sufficient to keep open the redemption: but it must be what is called a mortgage account. The late Master of the Rolls said, that he thought an account kept by the mortgagee, in a distinct book, of the rents and profits, and of the mortgage money and interest, with the balance struck, whereby a certain sum appeared to be due upon the mortgage, was something like a mortgage account; but would not allow an account by a receiver of the rents and disbursements to be any thing more than an account between receiver and land-owner. It appeared that the receiver's accounts had been kept in a separate book: but upon that circumstance he laid no weight. (b) If a mortgagee conveys, subject to the equity of redemption, (c) or if he devises it by

(y) 1 Ves. and Bea. 540.

(b) Barrow v. Marten, Coop.

(z) Fairfax v. Montague, cited

Cha. Ca. 189. 192, 193.

2 Ves. Jun. 84. Campbell v. Beck-

(c) Smart v. Hunt, 4 Ves. 478.

ford, cited 4 Ves. 474. See also

Hardy v. Reeves, 18 Ves. 460. 5

Lake v. Thomas, 3 Ves. 17.

Term Rep. 655.

(a) 3 Ves. 22.

the description of his mortgaged estate, (d) either of these will be an acknowledgment on which the mortgagor may be relieved. So in a case where the main ground of the decision was fraud, the Court expressed an opinion that the testator's saying in a will "that if the mortgage should be redeemed, the money should go," &c. would have been sufficient to preclude the objection from the length of time, as that declaration was made within the twenty years.(e) So a recital in a deed of assignment that a specified sum was due is sufficient evidence to make a mortgage redeemable, which otherwise would not have been so, on account of the length of time; and this though the assignment be absolute; but then the mortgagor must take the acknowledgment altogether as it stands, and cannot shew that a less sum is due than that specified in the recital.(f) But an assignment "subject nevertheless to such equity of redemption, if any," &c. will not prejudice the mortgagee.(g) Nor will a surrender of copyholds to the use of a mortgagee's will be any proof whether he considers the estate as redeemable or irredeemable.(h) The surrender, however, in such case must be a simple surrender; for if it be made "subject to the condition in equity," it is plain proof that the mortgagee considered his estate as redeemable.(i) An agreement between a mortgagor and mortgagee that until such a time there shall be no redemption, is an acknowledgment by the mortgagee of his possession in the character of mortgagee,(k) So if a mortgagee agree to purchase the equity of redemption, it

(d) 2 Atk. 314.

468. 480.

(e) Ord v. Smith, Sel. Cha. Ca. 9. S. C. 2 Eq. Ca. Abr. 600.

(h) Hardy v. Reeves, *ubi supra*, 2 Ves. jun. 22.

(f) Case before Lord Kenyon cited by the Chancellor, 2 Scho. and Lef. 296.

(i) Martin v. Mowlin, 2 Burr. 970. 977.

(g) Hardy v. Reeves, 4 Ves. 466.

(k) Hodle v. Healey, 1 Ves. and Bea. 536.

is sufficient to rebut the presumption arising in his favour from length of possession. (*k*) Or if upon a bill to redeem the mortgagee, instead of pleading the length of possession, submit to be redeemed, a redemption will be decreed with an account. (*l*) For, as Lord Thurlow lays it down, if a party will admit that he is only a mortgagee, he is bound by such admission, and cannot resist redemption. (*m*) From Lord Thurlow's decision in *Perry v. Marston*, (*n*) a doubt seems to have prevailed in the profession, whether conversation, or a mere verbal declaration by the mortgagee, is sufficient to keep alive the mortgagors' right of redemption. (*o*) But, from the circumstances of that case, it will appear that his Lordship's judgment turned upon a different point. (*p*) And the law, as it now stands, is, not that parol evidence shall be entirely excluded, but that, if admitted, it shall at least be clear and unequivocal. And on this latter ground it is, that most of the bills filed for redemption, resting on parol only, have been dismissed. (*q*)

Having considered what acts of the mortgagee will keep open the equity of redemption, it may be necessary to observe that a mortgagor coming to redeem cannot have a discovery unless his bill states a case entitling him to relief. (*r*) And where a creditor entered into possession of an estate under an agreement to receive the rents in discharge of his debt, upon a bill for relief, Lord Eldon refused to compel a discovery beyond what was necessary to ascertain the nature of the original transactions. (*s*)

(*k*) *Conway v. Shrimpton*, 1 Bro. P. C. 309.

(*l*) *Proctor v. Oates*, 2 Atk. 140.

(*m*) *Perry v. Marston*, 2 Bro. C. C. 397.

(*n*) 2 Bro. C. C. 397.

(*o*) 3 Ves. 21. 1 Ves. and Bea. 540.; and cases in the two next notes.

(*p*) See also *Coop. Cha. Ca. 5*.

(*q*) *Whiting v. White*, *Coop. Cha. Ca. 1*. *Reeks v. Postlethwaite*, *ibid.* 161. *Ibid.* 192.

(*r*) 1 Ves. and Bea. 539, *Metc.* Plead. 148. 2nd edit.

(*s*) *Fenwicke v. Reed*, 1 Mer. 114.

Fifthly, and lastly, We may consider how the mortgagee may take advantage of his length of possession, upon bills brought by the mortgagor, to be let into a redemption. At first it was considered that a mortgagee defendant, in a bill to redeem, could not take advantage of his length of possession in any other method than by insisting upon it by his answer. (*t*) Afterwards it was decided by Lord Hardwicke that a mortgagee might plead the statute of limitations in bar. (*u*) And, finally, it has been settled that length of possession may be insisted on by way of demurrer. (*x*) But then, in order to take advantage of this objection by demurrer, it is necessary that the bill should so state the case that there be nothing to interfere with the effect of the lapse of time, to the benefit of which the mortgagee is entitled; (*y*) though it is difficult to suppose a case in which the bill would not allege something to take it out of the analogy of the statute. (*z*) And moreover, it is necessary to the validity of a demurrer that the possession of the mortgagee for twenty years should appear upon the face of the bill. (*a*) And, therefore, where upon a bill brought in 1793 to redeem, the bill did not state any possession in the mortgagor within twenty years, otherwise than by saying that in or about the year 1770 the ancestor of the plaintiff died, and that soon after the

(*t*) *Pearson v. Pulley*, 1 Cha. Ca. 102. *Anon.* 2 Atk. 333.; and see 3 Atk. 225.

(*u*) *Aggas v. Pickerell*, 3 Atk. 225. *Clapham v. Boyer*, 1 Cha. Rep. 110. *Lake v. Thomas*, 3 Ves. 17.

(*x*) *Hodde v. Healey*, 1 Ves. and Bea. 536. 539. *Beckford v. Close*, cited 3 Bro. C. C. 644. S. C. cited 4 Ves. 476, 477. S. C. 19 Ves. 184. cited and approved of by Ld. Eldon,

*Frazer v. Moor*, Bunb. 54. 2 Scho. and Lef. 638. *Jenner v. Tracy*, 3 P. Wms. 287, note.

(*y*) 4 Ves. 478. 1 Ves. and Bea. 539. 19 Ves. 184. Mitf. Plead. 213. 2nd edit. *Orde v. Heming*, 1 Vern. 418. *Jenner v. Tracy*, 3 P. Wms. 287, note.

(*z*) 1 Ves. and Bea. 539.

(*a*) See the references in the last note but one.

plaintiff took possession. To which there was a demurrer; and the cause expressed was, that the bill only stated that in or about the year 1770, "which is upwards of 20 years before the bill filed, &c." Lord Loughborough said, "There is a vice in the demurrer which is fatal at law. It is a speaking demurrer. There is argument in the body of it, *viz.* "in or about the year 1770, which is upwards of twenty years before the bill filed." The proposition in the bill is merely that the ancestor died about the year 1770, and that soon after the mortgagor took possession. Therefore it was necessary for pleading any thing like correct to state positive dates. I am not to say, —how soon the drawer of the bill thought was soon." (b)

The statute 4 and 5 W. and M. c. 16. s. 1. enacts, that if a person, for valuable consideration, suffers any judgment, and afterwards for valuable consideration mortgages his lands, or any part thereof, without giving to the mortgagee notice in writing of the judgment, that he shall forfeit his equity of redemption to the mortgagee, unless within six months after notice given to him, by the mortgagee, he pays off such judgment, and procures it to be vacated by record.

The second section of the same statute enacts, that if a person for valuable consideration mortgages his lands, and afterwards for valuable consideration mortgages them or any part thereof to a second or other mortgagee (the former mortgage not being discharged) without giving notice in writing to such second or other mortgagee of the former mortgage or mortgages; that then such mortgagor shall forfeit his equity of redemption to such second or other mortgagee in such more than once mortgaged lands.

The third section provides that a second or other mortgagee, without notice, may redeem any former mortgage.

(b) *Edsell v. Buchanan*, 2 Ves. Jun. 83.

And the fourth section saves to the widow her dower, unless she legally joins her husband in any mortgage.

About fifteen years after the passing of this act a case (c) occurred, wherein it was laid down,—

1st, That a mortgage, which was originally irredeemable under the act, would remain irredeemable in the hands of an assignee, though assigned over for what was really due thereon for principal, interest, and costs.

2ndly, That if a subsequent mortgagee should redeem such foreclosing mortgage, he should hold the estate irredeemable.

3rdly, It was observed that part of the lands being only in the prior mortgage, and new and other lands in the second, was a case omitted out of the statute; and being a penal statute, it should be strictly construed: but the adding of an acre or two should not exempt it out of the statute; and, though a mortgage may be originally irredeemable, yet that it shall become redeemable in the hands of a person who has acted fraudulently in getting the mortgagor to mortgage a second time.

(c) *Stafford v. Selby*, 2 Vern. 528. See also the Case and Opinions in S. C. 1 Eq. Ca. Abr. 320. pl. 5. Collect. Jurid. Vol. II. 241.



## CHAPTER V.

## OF THE INTEREST ON MORTGAGE MONEY.

1. How interest may be reserved, and what shall be considered usury. 2. When given by the Court without any reservation. 3. Who shall pay interest. And, 4. When a mortgagee shall be prevented from claiming interest.

## HOW INTEREST MAY BE RESERVED, AND WHAT SHALL BE CONSIDERED USURY.

The statute 12 Ann. st. 2. c. 16. enacts, that no person shall take directly or indirectly more than at the rate of 5*l.* per cent. per annum for the loan of any money: declaring that all bonds, contracts, and assurances, for payment of any principal or money, to be lent or covenanted, to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred, shall be utterly void: and subjecting all persons, who take, accept, or receive, by any means more than after the rate of 5*l.* per cent. per annum, for the forbearing or giving day of payment of and for their money or other thing, to the forfeiture of treble the value of the monies or things lent, bargained, exchanged, or shifted.

Upon this statute it was said by Lord Hardwicke that if a mortgage were drawn for five per cent. only, and the mortgagee took six, it would be void upon the word

*take:* (a) but this doctrine was entirely contradicted in a late case, the Vice-chancellor saying, that “if usurious transactions afterwards take place, they will not affect the previous contract, that is very clear. If a bond be given, securing money with 5*l.* per cent. interest, and 7*l.* per cent. is afterwards agreed to be given, that is usurious: but the bond is not invalidated; and the obligee has a right to the money secured by it, with 5*l.* per cent. interest.” (b)

The statute has, in very general terms, prohibited the taking of more than 5*l.* per cent.; and, therefore, it is considered usury to make any advantage on the loan of money beyond interest at that rate, by whatever rule the benefit may be measured.

Thus, where 500*l.* was advanced upon a mortgage, and afterwards the parties went to another place where the mortgagor offered the mortgagee 50*l.*, who directed him to give it to his son then present, which was accordingly done; and, after that, interest was paid upon the 500*l.* at 5*l.* per cent.; it was considered usury. (c)

So, where a mortgagee procured the mortgagor to appoint him steward of a manor, the grant of the stewardship was set aside on the ground of imposition. (d) In like manner, if a mortgagee be appointed receiver of the rents of an estate with a salary for his trouble, it is an usurious contract. (e)

By an act of the assembly in Jamaica mortgagees in possession are declared not entitled to any commission, except what is paid to the factor for his commission: and, in case any greater commission is demanded, a penalty of 100*l.* for every offence is imposed. (f)

(a) In *Adlington v. Cann*, 3 *Atk.* 154.

(b) In *ex parte Jennings*, 1 *Mad.* 337.

(c) *Scurry v. Freeman*, 2 *Bos.* and *Pul.* 361.

(d) *Thornhill v. Evans*, 2 *Atk.* 330.

(e) *Scott v. Brest*, 2 *Term Rep.* 238. 9 *Ves.* 271, 272.

(f) 9 *Ves.* 268.

But a mortgage taken to secure a reasonable commission, beyond legal interest, for extra incidental charges, as upon agency in the remittance of bills, is not usurious. (g) So whatever allowances are usually made to bankers, beyond legal interest, may safely be secured to them by a mortgage; as commission, exchange, and discount, on bills of exchange and promissory notes. (h)

A mortgagee of West India estates is allowed the benefit of a covenant for consignments, for two reasons: 1st, because it furnishes him a security for his debt; and, 2dly, because the commission, which he receives, is supposed only a fair composition for his trouble. (i) And even a covenant to continue one as consignee, after he has been repaid his money, has been held to be good. As where A. and B., merchants of London, agreed to become sureties for C., and took a conveyance of West India plantations to secure to them what they might be called upon to pay, with a covenant that they should be continued consignees for five years after reimbursement of their advances, the agreement to continue them as consignees was held good. (k)

In *Palmer v. Baker*, (l) upon an assignment of a contract to purchase timber, part growing and part felled, upon trust to sell, with an agreement that the assignees might retain 200*l.* for their trouble, besides their principal, interest, and costs, it was held, by all the judges in K. B., that the contract for retaining 200*l.* for trouble was not usurious upon the face of it: but that, in order to establish it as usury, it must be proved that the reservation was only colourable. In this case, however, we are to observe that

(g) *Baynes v. Fry*, 15 Ves. 120.; 1 Bos. and Pull. 144. *Calist v. Walker*, 2 Anst. 495.  
and cases in next note.

(h) *Auriol v. Thomas*, 2 Term Rep. 52. *Benson v. Parry*, there cited *Winch v. Fenn*, stated in note, 2 Term Rep. 52. *Hammett v. Yea*, (i) 1 Jac. and Wal. 261.  
(k) *Bunbury v. Winter*, 1 Jac. & Walk. 255.  
(l) 1 Maul. & Selw. 56.

the trouble of the assignees was likely to be more than ordinary ; for, as was there said, the felling the timber might have been going on for three years, during which time the assignees might have had great trouble in procuring fit workmen and proper markets. Besides which the assignees were not skilled in the business: they must have employed an agent; gone from time to time to the spot to see that he did his duty ; and been responsible for any gross neglect in him. From which we may conclude that where a mortgage deed contains a power to sell on default, the case just mentioned would not authorize a reservation to him of any extra allowance for trouble, unless it appears that the circumstance of making the sale is likely to be attended with extraordinary trouble.

But if the principal money be really and *boná fide* hazarded, it is not usury to take more than 5*l.* per cent. Therefore, where there are partners, an advantage to be taken out of the trade may be measured in any way agreed on; for the money is not lying at interest, but employed in making profits subject to losses. (*m*) So, upon a loan of 2000*l.*, a bond conditioned to pay 200*l.* at the end of a year, and the principal, or 250*l.* per annum, during the borrower's life, is not usurious. (*n*) For here, so far as the lender is concerned, the principal money is, in fact, put in jeopardy. Upon the same principle are supported the common annuity transactions, with agreements to repurchase.

A creditor for a certain sum of money, who takes a security for the transfer or investment, in his name, of a certain quantity of stock, fixing the amount of the stock by what the debt would have purchased according to the market price of the day, on which the security is taken

(*m*) *Anderson v. Maltby*, 2 Ves. son, 4 Term Rep. 353.

Jun. 248.; but see *Morne v. Wil.* (*n*) *Wortley v. Pitt*, 1 Ves. 164.

with such interest in the mean time as the stock would have given, if purchased, is neither guilty of usury under the 12 of Ann., nor is he within the prohibition of the stock-jobbing act of the 7 G. 2. c. 8.(o)

So, if a lender sell stock, and pay over the money, and take a security from the borrower to replace the stock by a certain time, or repay the money, with such interest in the mean time as the stock itself would have produced; it is not usurious, though the interest exceed 5*l.* per cent.(p) Yet, in such case, if the choice of paying the money, or replacing the stock, by the time appointed, depend on the will of the lender only, the security is clearly void as usurious, because the lender is at any rate sure of his principal and interest, with a chance of a rise in the stock.(q)

But the borrower of money, under an agreement to replace stock, cannot take advantage of his own neglect. And, therefore, where F. sold out 8000*l.* old South Sea annuities, and took a bond from F. to replace the stock at the end of six months, and for payment of legal interest on 7170*l.*, the produce of the sale in the mean time. Afterwards F. made default in replacing the stock; and the matter coming on in Chancery, when the value of the stock was very much depreciated, the Master of the Rolls allowed the claimants, under E., to recover the money for which the stock was sold, with interest in the mean time at 5*l.* per cent. though it was insisted on the part of the defendants, that they might discharge themselves of the penalty by replacing the stock. In the same case his Honour observed, that if an action had been brought recently upon the breach of the agreement, and the stock

(o) *Maddock v. Rumball*, 8 Rep. 531.

East. 304. *Sanders v. Kentish*, 8 (q) *Barnard v. Young*, 17 Ves. Term Rep. 162. 2 Espi. 698. 44.

(p) *Tate v. Wellings*, 3 Term

had risen, the jury would, by way of damages, have given the rise, and would not have confined it. (*r*)

And, accordingly, in a subsequent case upon a writ of enquiry to assess damages on a bond, the only question was, whether the damages should be calculated at the price of the stock on the day when it was to be replaced, or at the price of the stock on the day of the trial, the value of the stock having risen in the mean time; and it was decided that the plaintiff was entitled to recover the larger sum, being that which could alone indemnify him at the time of the action brought (*s*) From whence it follows that upon all securities for the replacing of stock the mortgagor should be particularly careful to perform the condition at the very day; for any default on his part will turn to the advantage of the mortgagee; and, in the same proportion, prejudice him, the mortgagor.

In *Shepherd v. Johnson* (*t*) this very circumstance of its being in the power of the lender, after a default once made, to take advantage of the rise in the market without any risk in case the market fell either by hastening or delaying his suit, was urged as an objection against assessing the damages at the value of the stock at the time of the action brought; and for that purpose was cited a case before Lord Kenyon: (*u*) but the objection was completely answered by Grose, who said, "that it was no answer to say—that the defendant might be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he might replace it at any time afterwards, so as to avail himself of a rising market."

(*r*) *Forrest v. Elwes*, 4 Ves. 492. 2 Taunt. 257.

*Dutch v. Warren*, cited 2 Burr. (*t*) 2 East. 211.

1010. S. C. 1 Stra. 406.

(*u*) *Isherwood v. Seddon*, cited 2

(*s*) *Shepherd v. Johnson*, 2 East. East. 212.

211. *Mc. Arthur v. Lord Seaforth*,

If the borrower fails to replace stock according to his agreement, and the market rises in the mean time, and the cause be in Chancery, the Court will compel him to replace it at the then price,(x) though, perhaps, the regular way would be to direct an issue *quantum damnificatus*.(y)

But in order to make a mortgage for securing money in the shape of stock, free from usury, it is necessary that the value of the sum secured should be fixed by the price of stock at the day of taking the security. Wherefore, where a mortgagee took stock at 75 per cent., whereas the current price of the day was but  $72\frac{1}{4}$ , the transaction was held to be clearly usurious. (z) So where one agreed to lend 1000*l.*, and for that purpose sold 1000*l.* South Sea Annuities, which being under par produced only 924*l.*, and took a mortgage for 1000*l.* and interest, it was considered usury.(a)

In order to constitute usury within the statute of 12 Ann. stat. 2. c. 16. so as not only to make the assurance void, but to subject the party to the penalty, there must be both an usurious contract at the time of the loan, and an usurious taking in pursuance of it of money or of money's worth.(b) But the clauses of the statute, which make void the usurious security, and which subject the lender to the penalty, are distinct.(c) Therefore, if at the time of the contract no greater interest be reserved than allowed by the statute, the security is good, and no subsequent event can make it void. Yet, in this case, if the lender afterwards takes more than legal interest, though the security is good, yet the penalty of forfeiting the treble

(x) Lawrence's Judgment, 2 East. 212, 213.

(y) 4 Ves. 498.

(z) Doe dem. Davidson v. Barnard, 1 Espi. 11.

(a) Moore v. Battie, Amb. 371.

(b) Scott v. Brest, 2 Term Rep. 241. Maddock v. Hammett, 7 T. R. 184.

(c) Fisher v. Beasley, Doug. 237. 3d edit.

value is incurred. On the other hand the penalty may be saved, and still the contract be void as usurious. For if more than legal interest be reserved, the security is *ipso facto* void under the statute ; yet if the lender never receive more than legal interest, the penalty is never incurred. (d) Which causes a distinction between a taking which shall avoid the security, and a taking which shall subject the party to the penalty : for if a part of the money be returned at the time, or if a premium be given for the advance, the security is void as usurious : but in order to incur the penalty, there must be an illegal taking in respect of interest. (e)

If a mortgagor on an usurious contract pay the money, he may afterwards, in equity, recover the surplus beyond the legal interest, though the payment was made under a decree of the Court. (f) So, indeed, he may at law recover the excess in an action for money had and received ; (g) though it was formerly held otherwise. (h)

If a plaintiff in equity pray that an instrument or security given for usurious consideration be delivered up to be cancelled, the only terms upon which equity will interpose are, the plaintiff paying to the defendant what is really and *bonâ fide* due to him. (i) And if the plaintiff do not make such offer by his bill, the defendant may demur ; (k)

(d) Sergeant Williams's note, 245, 246.

1 Saund. 295. Ferrall v. Shaen,  
1 Saund. 294.

(e) Fisher v. Beasley, Doug.  
235. Wade v. Wilson, 1 East,  
195. Lloyd v. Williams, 3 Wils.  
250. S. C. 2 Blackst. 792. Scurry  
v. Freeman, 2 Bos. and Pull. 381.

(f) Moore v. Battie, Amb. 371.  
Bosanquet v. Dashwood, Cas. temp.  
Talb. 38. Doug. 697. *in notis*, 1  
Ves. 320. 1 Fonbl. Treat. Eq. 23.

(g) Browning v. Morris, Cowp.  
792. Jaques v. Withy, 2 H.  
Blackst. 65. See also Jaques v.  
Golightly, 2 Blackst. 1073.

(h) Amb. 373. Tomkins v. Bar-  
net, 1 Salk. 22. Doug. 697. *in*  
*notis*.

(i) Scott v. Nesbitt, 2 Bro. C. C.  
649. 1 Ves. 320.

(k) Mason v. Gardner, Nov. 1,  
1793, MS. cited 1 Fonbl. Treat. Eq.



whereas, if the party claiming under such instrument come into equity to render his claim available, the Court will proceed upon the letter of the statute. (*l*) In this respect, too, of relief upon an equitable security, the rules of law and equity were formerly different; for in Lord Hardwicke's time the courts of law used to consider usurious securities on the face of the statutes only; (*m*) and, therefore, whether the lender or borrower were the party seeking relief, held them absolutely void. But since that time the law in this respect is altered. And it is now incumbent upon the plaintiff to entitle himself to relief in a civil action, even at law, to shew that he has done all that equity requires. (*n*)

But in cases of bankruptcy the rule in equity is different. For if a creditor claiming under an usurious security come to prove, any other creditor or the bankrupt himself may present a petition; which he has a mode of verifying, that is not open to him upon a bill; the Court, upon his affidavit stating the usury, putting the creditor to answer; and upon a principle quite different to that which obtains in a suit, for the plaintiff in a bill could not offer to redeem without paying what was due; but by the jurisdiction in bankruptcy, upon a petition supported by the oath of the party interested, unanswered, the security is cut down altogether; not leaving the party a creditor, even for what was actually advanced. (*o*) And if a security is said to be tainted with usury, the Court will, in the first instance, decide upon that, without directing an inquiry before the Commissioners, or an issue. (*p*)

23. *Earl of Suffolk v. Green*, 1 (*n*) *Fitzroy v. Gwillim*, 1 Term  
Atk. 450. *Chauncey v. Tahour-* Rep. 153.  
den, 2 Atk. 392. (*o*) 9 Ves. 84.

(*l*) 1 Fonbl. Treat. Eq. 23.

(*m*) 1 Ves. 320.

(*p*) *Ex parte Jennings*, 1 Mad.  
336.

The statute of usury so completely avoids the security, that it cannot be enforced at law by any person, however innocent. Therefore, it seems, that at law a mortgage given for an usurious consideration would be void, even in the hands of an assignee, for valuable consideration, without notice of the usury. (*q*)

Parol evidence is admissible to shew a transaction usurious; (*r*) and, indeed, in many instances it is the only evidence that can be had.

It was formerly holden, that if a contract were made in England for the mortgage of lands in Ireland or the West Indies, and the mortgage was executed in England, that more than English interest could not be taken upon such mortgage: (*s*) but that, although the contract were made here, yet if the mortgage was executed in the country where the lands lay, that the interest allowed by the law of the particular country might be taken. (*t*) But now, by the statute of the 14 G. 3. c. 79. it is enacted, that all mortgages and securities executed in Great Britain upon property in Ireland or the West Indies, for securing money to be thereupon really and *bonâ fide* advanced, with interest, not exceeding six per cent.; and all bonds, covenants, and other securities for payment of the same, shall be valid and effectual, unless it shall be known to the lender that the money exceeds the value of the property, if it were to be sold at the time of the advancing or lending of the money. The fourth section of the same statute enacts that the borrower of any money, under the act, exceeding the value of the property above all incumbrances at the time of the

(*q*) *Lowe v. Waller*, Doug. 736.  
3d edit.

(*r*) 3 Atk. 154.

(*s*) *Stapleton v. Conway*, 3 Atk. 727. S. C. 1 Ves. 427. *Phipps v. The Earl of Anglesea*, 1. P. Wms. 696.

(*t*) *Connar v. The Earl of Bellamont*, 2 Atk. 381. *Saunders v. Drake*, 2 Atk. 465. *Champan v. Ranelagh*, Cha. Prec. 128. S. C. 2 Vern. 395, otherwise reported. *Bodily v. Bellamy*, 2 Burr. 1094.

borrowing, shall forfeit treble the value of the sum borrowed, one half to the informer, and the other half to Greenwich Hospital. And the fifth section enacts that all securities under the act shall be registered where the property lies, within the time limited by the laws of the place ; otherwise, that the same shall be subject to the penalties of the statute of usury of the 12th Ann., unless the mortgagee or lender shall have used his utmost endeavours to cause the same to be registered within the time limited by the act.

The statute having made effectual securities which reserve interest not exceeding six per cent., it follows that the rule, above-stated to have been laid down previously to the statute, with respect to the interest on Irish and West India mortgages, still holds where the interest reserved is more than six per cent. (*u*)

The statute, moreover, is confined to cases of loans upon property, and does not authorize the taking of six per cent. interest upon mere personal contracts, (*x*) though a bond or covenant given as a collateral security is expressly made good. (*y*)

The statute of the 14 Geo. 3. furnishes an instance in which the rule respecting the law of mortgages in the West Indies and England is different. But independently of such like particular laws, and the law and usage of the different islands in the West Indies, courts of justice, here, apply to the relation of mortgagor and mortgagee upon West India mortgages all the principles that exist as to that relation here. (*z*)

If a mortgage specifies no precise rate of interest, but it be reserved generally by such words as "lawful" or "legal" interest, the rate of interest will be five per cent. (*a*)

Lord Eldon is reported to have said that "in the in-

(*u*) Mr. Saunders's note to *Con-*  
*nor v. Bellamont*, 2 Atk. 382.

(*x*) *Dewar v. Span*, 3 Term Rep. 425.

(*y*) See the 14 Geo. 3. c. 79. s. 1.  
(*z*) 9 Ves. 271.

(*a*) *Forrest v. Elwes*, 4 Ves.

stance of a mortgage with interest at five per cent., and a condition to take four, if regularly paid; or at four per cent., with a condition for five, if not regularly paid; at law you might, in that case, recover the five per cent., for it is the *legal* interest. But this Court regards the five per cent. as a penalty for securing the four; and time is no farther the essence, than that if it is not paid at the time, the party may be relieved from paying the five per cent. by paying the four per cent., and putting the other party in the same condition as if the four per cent. had been paid; that is, by paying him interest upon the four per cent. as if it had been received at the time." (b) In this position we are to observe that no difference is made between the case of a reservation at five per cent. with an agreement to take four per cent. on regular payment; and a reservation at four per cent. with a condition to pay five per cent. if not regularly paid. How far it may influence future decisions it is not for us to determine. But at present it cannot be supposed to have overruled a variety of decisions, whereby it would appear that if interest be reserved at five per cent. with an agreement to accept four if punctually paid, this condition must be strictly performed; and the debtor shall not have relief in equity after the day of payment is elapsed, because the one per cent. was to be abated on a condition, which is not performed. But if four per cent. be reserved with an agreement that if the four be not punctually paid at the day the mortgagor shall pay five, that shall be considered as a *penalty* added; and a court of equity will in such case relieve against it. (c)

492. 9 Ves. 273. *Slack v. Lowell*, *Barkham*, 1 P. Wms. 652.

3 Taunt. 157. *Upton v. Lord Ferrers*, 5 Ves. 803. 3 Ves. 134, 135. (c) 3 Burr. 1374. *Barnard Cha. Rep.* 481. 3 Blackst. Com. 432.

(b) 7 Ves. 273, 274. *Mosl. Holles v. Wyse*, 2 Vern. 289. 247, 248. 2 Eden. 199. *Reporter's Strode v. Parker*, 2 Vern. 289. 316. *quære*, 2 Vern. 316. *Brown v. From* which it appears that *Halifax*

But if an indulgence be given to the mortgagor, there is no distinction whether the agreement be to raise the rate of interest in default of regular payment, or to lower it in case of punctual payment: but it will be binding on the parties upon the ground of forbearance, the additional interest in that case not being considered a penalty, but as a liquidated satisfaction, fixed and agreed upon by the parties. As, where a long arrear of interest had accrued, and the mortgagee sent an account thereof to the mortgagor, who returned an answer, desiring forbearance, and promising to make satisfaction for the same, Lord Chancellor Parker allowed the additional one per cent. reserved, as a satisfaction for the forbearance. (*r*)

So where one made a mortgage in Ireland to trustees for securing debts to creditors, so that no money actually passed; but the sum nominally lent was to be paid by instalments; an agreement that the interest of those sums should rise on non-payment at the time appointed, or within three weeks after, from five to eight per cent., was held good, upon an appeal to the House of Lords. (*s*)

An original covenant to turn interest into principal is not usurious: but it is discountenanced by the Courts as tending to usury, and will not be allowed. (*t*)

Thus, where a mortgage deed contained a proviso that if the interest was six months in arrear, that then that interest should be accounted principal, and carry interest, Lord Chancellor Cowper decreed the clause to be

*v. Higgins*, 2 Vern. 134. which Pollexfen, there cited.  
seems contra, is misstated. *Jory v.* (*r*) *Brown v. Barkham*, 1 P. Wms.  
*Cox*, Cha. Prec. 160.; and the Re- 652.  
porter's note there, as to *Halifax v.* (*s*) *Burton v. Slattery*, 3 Bro.  
*Higgins* being misstated. *Nicholls* P. C. 68.  
*v. Maynard*, 3 Atk. 519. *Brown* (*t*) 9 Ves. 271. *Le Grange v.*  
*v. Barkham*, 1 P. Wms. 652. *Stan-* *Hamilton*, 4 Term Rep. 613. af-  
*hope v. Manners*, 2 Eden. 197. firmed in *Excheq. Chamb.* 5 Term  
*Mos.* 247, 248.; and *Mitchell v.* Rep. 367. 2 H. Bla. 144.

vain, and of no use, saying, that an agreement made at the time of the mortgage will not be sufficient to make future interest principal: but to make interest principal it is requisite that interest be first grown due, and then an agreement concerning it may make it principal. (*u*)

And even where interest is turned into principal by an agreement made after the interest has become due, it must be upon a fair agreement. (*x*) For, wherever there is usury, extortion, or oppression, as in making a mortgage, and accumulating interest, the Court often directs, in the decree, to take every thing most strongly against such person; and rightly. (*y*)

But a first mortgagee, who has notice of subsequent incumbrancers, cannot turn his arrear of interest into principal, as against them. (*z*)

The rate of interest reserved upon a mortgage may be altered by parol; for, though a written agreement cannot be contradicted by parol, yet it may be waived in part, or in the whole, or be varied, in the terms of it, by a subsequent parol agreement. And an issue may be directed to try the existence of such an agreement; notwithstanding the plaintiff, by his answer, expressly denies any such agreement. (*a*)

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|---|---|
| ( <i>u</i> ) Lord Ossulton v. Lord Yar- | 330.                                      |
| mouth, 1 Salk. 449. Broadway v.         | ( <i>y</i> ) Mitford v. Featherstonhaugh, |
| Morecraft, Mos. 247. Strutton v.        | 2 Ves. 445. Thornhill v. Evans,           |
| Meers, there cited, S. C. cited Cas.    | 2 Atk. 330.                               |
| Temp. Talb. 40. 1 Atk. 304. 1           | ( <i>z</i> ) Digby v. Craggs, 2 Eden.     |
| Ball and Beat. 430. Ex parte Be-        | 200. S. C. Amb. 612.                      |
| van, 9 Ves. 223.                        | ( <i>a</i> ) Lord Milton v. Edgworth, 6   |
| ( <i>x</i> ) Thornhill v. Evans, 2 Atk. | Bro. P. C. 580.                           |

INTEREST, WHEN ALLOWED WITHOUT AN EXPRESS  
RESERVATION.

It being established that interest cannot be turned into principal till it has become due, and then only by an express agreement, it follows that the courts of equity will never allow interest upon interest merely because the interest is in arrear when the mortgage is paid off. (*b*)

If interest has been for a long time paid upon a consolidated sum of principal and interest, an agreement to turn interest into principal will be inferred. (*c*)

If there be an arrear of interest due upon a mortgage, and the mortgagee assigns the same with the concurrence of the mortgagor, all money paid by the assignee to the mortgagee, in respect of interest, shall be considered as principal, and carry interest. (*d*) But, where it is assigned without the consent of the mortgagor, the assignee must take it only upon the same terms with the mortgagee. (*e*) So, if the assignee never pays the money, but the assignment, instead of being *bonâ fide* and for valuable consideration, is only colourable in order to load the mortgagor with compound interest, it will not be allowed to have the effect of turning the interest into principal. (*f*)

If an estate be sold by order of the Court, and the pur-

(*b*) Proctor v. Cowper, Cha. Prec. 116. Thornhill v. Evans, 2 Atk. 332.

(*c*) M'Carthy v. Llandaff, 1 Ball & Beat. 375.

(*d*) Ashenhurst v. James, 3 Atk. 270. Smith v. Pemberton, 2 Freem. 184. S. C. 1 Cha. Ca. 67. Ibid. 258. Gladwin v. Hitchman, 2 Vern. 135.

(*e*) 3 Atk. 271. Earl of Macclesfield v. Fitton, 1 Vern. 168. Porter v. Hubbard, there cited. S. C. reported, 3 Cha. Rep. 78. Nels. C. C. 150.

(*f*) Smith v. Pemberton, 1 Cha. Ca. 68. S. C. 2 Freem. 184. 1 Eq. Ca. Abr. 329. pl. 1.

chaser takes an assignment of the incumbrances, with the consent of the parties entitled to the estate, he will be considered a creditor for the whole principal sum, so as to be entitled to interest upon the monies paid by him, in respect of interest, because the consent of the persons entitled is the same thing as if they had been made parties to the assignment. (*g*)

Where an account is settled before a master between a mortgagor and mortgagee, the whole sum found due by him, whether for principal, interest, or costs, will become one consolidated sum, and carry interest: but, in order so to do, it is absolutely necessary that the master's report should be confirmed; and the interest, on the consolidated sum, will be accounted only from the confirmation; (*h*) but upon the principal, from the date of the report up to the time of the confirmation. (*i*)

But a private account signed and settled between the parties will not of itself make the interest on mortgage money principal, because the land is to be charged; and the account of itself does not shew any agreement or intent to alter the interest, or the nature of that part of the debt, or turn it into principal, but in order so to do there must be an express agreement from the mortgagor to pay interest upon the interest. (*k*)

If the mortgagor agree to make satisfaction to the mortgagee for forbearing to call in his money, and a great arrears of interest incur, the Court will give the mortgagee

(*g*) *Ashenhurst v. James*, 3 Atk. 270. *kings v. Baynton*, 1 Bro. C. C. 574. *Fonbl. Tr. Eq. Vol. II. B. 1. c. 5.*

(*h*) *Kelly v. Lord Belton*, 1 Bro. s. 4.

P. C. 202. 4 Bro. P. C. 451. 1st edit. *Attorney General v. Brew-* (*i*) *Jacob v. Earl of Suffolk*, *Mosl.* 27.

*ers' Company*, 1 P. Wms. 376. (*k*) *Brown v. Barkham*, 1 P. *Ibid.* 453. 480. 2 Ves. Jun. 159. *Wms.* 652. *Boddum v. Riley*, 2 *Bickham v. Cross*, 2 Ves. 471. *Per-* *Bro. C. C. 3.*



some allowance in this respect. And if there be a condition in the mortgage to raise the interest on irregular payment, instead of holding the advanced rate of interest as penal, it will take that as the satisfaction agreed upon by the parties. (*l*)

In consequence of the principal, interest, and costs, becoming one consolidated sum from the confirmation of the master's report, it follows that if the mortgagor or a subsequent mortgagee pray any longer time to redeem, and the Court enlarges the time, it is but just and reasonable that they should pay interest upon the whole sum. (*m*)

Where a variety of creditors pray a sale of an estate, and some of those creditors, being mortgagees, come into Court for a separate report, the Court sometimes puts it upon them to consent that, notwithstanding the separate report, that shall not carry interest on the whole sum; for though interest on the compound sum is always allowed in favour of mortgagees, yet the Court has always considered it as discretionary; (*n*) and has, therefore, varied the rate of interest on the compound sum, so as to lessen it to four per cent, where the original debt carried five per cent. in favour of other creditors, where the produce of the estate has proved deficient to pay them all. (*o*) But it seems that an order restraining the mortgagee from claiming interest on the compound sum will be made only where a deficiency in the produce of the estate is apprehended; and will be without prejudice, if there should afterwards appear to be a surplus. (*p*)

(*l*) *Brown v. Barkham*, 1 P. 471. *Astley v. Powis*, 1 Ves. 496, Wms. 652. 497. *Badham v. Odell*, 4 Bro.

(*m*) *Neal v. Attorney-General*, P. C. 447.

Mosl. 246. *Bickham v. Cross*, 2 (*o*) *Harris v. Harris*, 3 Atk. 722. Ves. 471. and see cases in next 1 Ves. 496, 497.

note. (*p*) *Neal v. Attorney General*

(*n*) *Bickham v. Cross*, 2 Ves. Mosl. 246.

In the case of an infant defendant in a bill of foreclosure, an account in Chancery will not, as it seems, convert the interest into principal ;(q) for one of the grounds on which interest is turned into principal is as a punishment on the mortgagor for the non-performance of his contract, which ought not to operate against an infant.

But if an infant, instead of being defendant, be the party seeking relief, as the *plaintiff* in a bill to redeem, and an account be taken, reported, and confirmed, there the whole sum will bear interest from the confirmation, nothing being more certain than that an infant is bound by an account taken in a cause, wherein he is plaintiff; more especially if he cannot shew any fraud or error to his prejudice. And, accordingly, a decree to the contrary was reversed in the House of Lords. (r)

So, likewise, if an infant agrees to allow interest upon interest, and thereby receives a benefit, he will be bound by his agreement; for the law, at the same time that it prevents infants from doing any act to their own prejudice, enables them to do binding acts without prejudice to themselves, and for the benefit of others. (s) Thus, where I. S. mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, an infant, who had nothing to subsist on but the rents of the mortgaged estate; and the interest being suffered to run in arrear three years and a half; the plaintiff grew uneasy at it, and threatened to enter on the estate, unless the interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account; and the defendant herself, who was then near of age, signed it. And the account being admitted to be fair, it was held by Lord Chancellor Somers, and affirmed by

(q) *Bennett v. Edwards*, 2 Vern. P. C. 447.

392.

(s) *Co. Lit.* 171. b. 172. a. 315. a.

(r) *Badham v. Odell*, 4 Bro.

Lord Keeper Wright, that though regularly interest should not carry interest, yet, in some cases, and upon some circumstances, it would be injustice if interest should not be made principal; and the rather in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence. (t)

Where one mortgaged a reversion dependent upon a lease for three lives, on which a rent of 7*l.* 10*s.* only was reserved, and which lease was still in being at the time of the bill brought, for 1000*l.* and 60*l.* per annum interest, which was also secured by covenant, Lord Keeper North was clear of opinion that, as to so much interest as was reserved in the body of the deed, that should be reckoned principal; for it being ascertained by the deed, an action of debt would lie for it; and, therefore, it was reasonable there should be damages given for the non-payment of that money; and took a distinction between debt and damages; and accordingly decreed, that after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a-year, payable for the interest, the defendant should be allowed interest for the residue of the said 60*l.* a-year, for which the defendant might have sued at law, and recovered damages. (u) Mr. Powell, after noticing this case, proceeds, "But here we must attend to the distinction between the last case, where the security for the interest rested in *covenant only*, and the ordinary cases, where the rents of the mortgaged premises are sufficient to pay the interest; as, *if this determination be according to law*, it appears to me it must have turned upon that point." (v) But this reasoning, if ever it prevailed, cannot be supposed to have any weight at present; and, accordingly, we find

(t) *Chesterfield v. Cromwell*, 1 190. S. C. 2 Cha. Ca. 147.

Eq. Ca. Abr. 287.

(v) *Pow. on Mortg.*, Vol. II.

(u) *Howard v. Harris*, 1 Vern. 990, 991.

in a case which occurred about seventeen years after that of *Howard v. Harris*, the Master of the Rolls addressing himself to this very point, and refusing to allow interest upon interest, saying, that though the profits were not sufficient to answer the interest, yet the arrears cannot carry interest, but the costs and charges must. (x) So that, whether the annual value of the estate exceeds the interest of the mortgage money or not, the rules respecting the allowing of interest on interest will be the same.

Where a sale is avoided, the purchase money for which was secured with interest, and interest paid, such payments of interest must be taken as principal, and repaid with interest; for the transaction being avoided, the vendor is not entitled to any thing as interest. (y)

A judgment at law will have the same effect in turning interest into principal as an account confirmed in Chancery. And, therefore, where in an action on promissory notes, and also on an agreement to replace stock in the funds, and pay sums equal to the dividends in the mean time, a verdict was found giving interest on the notes, and dividends on the stock up to the time of the verdict, upon the affirmance in error, the Court gave interest (not further dividends) on all the capital sums recovered up to the time of the affirmance. (z)

A mortgagee is entitled to all the costs and expences he may have been put to together with interest. (a) In general this interest will be regulated by the interest payable upon the money originally lent, and will be at the same rate. (b) At the same time, such interest being to be com-

(x) *Proctor v. Cooper*, Cha. Prec. 116. *ran v. O'Reilly, or Anon.* 7 Taunt. 244.

(y) *Murray v. Palmer*, 2 Scho. & Lef. 474. 488. (a) *Proctor v. Cooper*, Cha. Prec. 116. 3 Atk. 518. 4 Ves. 482.

(z) *Dwyer v. Gurry*, in Cam. Scac. 7 Taunt. 14. See also *Do.* 551. (b) *Woolley v. Drage*, 2 Austr.

puted not by agreement of the parties, but by course of the Court, the rate is always in the discretion of the Court. (c)

So consequent is interest upon the principal sum lent, that even a promise to give a mortgage will entitle the mortgagee to interest. (d)

In an account upon a mortgage all money paid as surety is reckoned principal from the time of payment, and carries interest accordingly. (e)

Where a mortgagor becomes bankrupt, and the mortgage is inadequate to the payment of principal and interest, the mortgagee will only be entitled to interest up to the date of the commission. (f) But if the mortgage is a sufficient security, the assignees cannot redeem without paying interest up to the time of redemption. (g)

The principal money and interest upon a mortgage are not one integral sum, but are two completely distinct and independent sums, though payable at the same time, and under the same instrument; so that a mortgagee is not compellable to sue for both in the same action, but may proceed by separate actions, one for the principal sum, and another for the interest, at his election. (h) But he cannot proceed in debt for part of the principal sum, without averring in his declaration that the rest has been satisfied. (i)

But, as between the mortgagee and the estate, the interest on mortgage money is always charged on the same fund as the principal. (k)

(c) 1 Ves. 496.; and see *Lyster v. Dolland*, 1 Ves. Jun. 456.

(d) *Anon.* 4 Taunt. 876. In Cam. Scac.

(e) *Morley v. Elwis*, 2 Keb. 376.

(f) *Ex parte Badger*, 4 Ves. 165.  
*Ex parte Wardell* and *Ex parte Harvey*, 1 Cooke's Bank. Law. 195.

(g) 7 Vin. Abr. 110. B. a. pl. 1 and 3.

(h) *Dickenson v. Harrison*, 4 Price 282.

(i) 4 Price 287, 288.

(k) *Shafto v. Shafto*, 2 P. Wms. 664. Cox's note. 2 Ves. 53.

## WHO SHALL PAY INTEREST.

If a person seized in fee make a mortgage, there, without question, he will be chargeable with principal and all the interest. But what if an estate which has been mortgaged come to one for life only, remainders over? Here, according to the modern rule, it would be unjust to charge the tenant for life with any part of the principal. Formerly, indeed, it was held that a tenant for life should be charged with the principal, according to his proportion of the interest in the estate. And this interest was sometimes valued at two-fifths of the mortgage money, (*l*) but more frequently at one-third; (*m*) and the remainder-man had to pay the residue. Yet this was a most arbitrary rule; for the tenant for life might live to enjoy the estate for twenty years, or only one year. Wherefore we find it very early laid down that in order to entitle a remainder-man to an allowance from the tenant for life, according to the proportion of his estate, it was incumbent upon him to come in to redeem in the lifetime of the tenant for life, for he could not after his decease compel a contribution from his assets beyond an allowance only for the time that the tenant for life actually enjoyed the estate. (*n*) And in the time of Chief Baron Gilbert, the remainder-man had no direct way of compelling the tenant for life to join in a re-

(*l*) 1 P. Wms. 650. *James v. Selby*, Cha. Prec. 288. *Flud v. Hales*, 2 Vern. 267. S. C. Cha. Prec. 44. *Flud*, 2 Freem. 210. *Clyat v. Batteson*, 1 Vern. 404., and see *Rives v. Rives*, Cha. Prec. 22. 1 Ves. 430. 1 P. Wms. 650. 1 Atk. 467. Amb. 88.

(*m*) *Cornish v. Mew*, 1 Cha. Ca. 271. *Rowell v. Walley*, 1 Cha. Rep. 221. *Ballet v. Spranger*, Cha. Prec. 62. *Howell v. Price*, Cha. Prec. 424, 425. *Jones v. (n) Clyat v. Batteson*, 1 Vern. 404. 3 Atk. 201.

demption; (o) though, while the old rule was acknowledged, he had. (p) But this rule, imposing upon the tenant for life the payment of a gross sum, the inconvenience of which seems to have been long felt, is now completely exploded. (q) And the courts of equity endeavour, as formerly, to make every part of the ownership bear a proportion of the incumbrance, only in a different manner. And it is now held that every particular tenant, be it for years or for life, which comprizes all the different species of life estates as those of tenants by the curtesy, and a jointress, who claims lands subject to a mortgage, shall each of them keep down the interest during the continuance of his or her particular estate. (r) And, in order to compel these particular tenants to keep down the interest during their respective estates, the remainder-man has his remedy in equity. (s) Which may be effected by his going into Chancery, if the mortgagee is not in possession, and having a receiver appointed of the rents and profits of the estate, who will be directed to keep down the interest. (t)

Tenant for life must also keep down the interest up to the very day of his death, and not only as far as any quarterly or half-yearly day of payment; for the interest on a mortgage becomes due from day to day, and the mortgagee may call in his money, whenever he will. (u)

If a mortgage be made of a variety of estates, part in possession, and part in reversion, expectant upon the life

(o) *Hungerford v. Hungerford*, 480. 2 Atk. 463. *Corbett v. Barker*, 1 Anstr. 138. S. C. 3 Anstr.

(p) See and consider *Clyat v.* 755. 6 Dow. 21.

*Batteson*, 1 Vern. 404. *Cornish* (s) *Casborne v. Scarfe*, 1 Atk. 606.

*v. Mew*, 1 Cha. Ca. 271. *Hayes* (t) 5 Ves. 101, 102. By Counsel arguendo.

(q) 5 Ves. 107.

(r) *Amesbury v. Brown*, 1 Ves. (u) 2 Ves. 673.

estate of A. and afterwards all those mortgaged estates come to B. for life, (living A.) B. must apply all the profits of his life estate in possession in keeping down the interest of the mortgage; and if those profits are insufficient, his life estate in reversion upon the death of A. will be chargeable with the arrears of the interest; and the rule will be the same, though by this means it may turn out that B. never gets any advantage from his life estate. (x)

So, where a testator devised his estates to trustees to raise and pay debts, and subject thereto to his daughter for life with remainders over. The profits of the estate devised to the daughter were not sufficient to keep down the interest during the mother's lifetime, who had a jointure on the estate by a prior settlement: but after her decease they were more than sufficient. The mother living two years, an arrear of interest accrued. And it was decreed by Lord Hardwicke that the surplus after the mother's decease being an accruer to the trust estate, must be applied to answer the former deficiency; and the trust must be considered as entire during the daughter's estate for life. That any other construction would create inconvenience and confusion. (y)

Indeed, from the argument of the Master of the Rolls, in *Lord Penhryn v. Hughes*, (z) it appears as perfectly established, that where an estate in mortgage is settled upon a variety of tenants for life in succession, and the profits of the estate are insufficient to keep down the interest of the mortgage money, the rents and profits of the estate during the life of a tenant for life in remainder must be applied to the reduction of any interest accrued due prior as well as subsequent to the commencement of his estate. The ground of this is, that the estate in the hands of the tenant for life is liable to the in-

(x) *Tracey v. Lady Hereford*,  
2 Bl. C. C. 128. 1 Ves. 94.

(y) *Revel v. Watkinson*, 1 Ves. 93.

(z) 5 Ves. 106, 107.



cumbrances, is in the first place amenable, and may be made so by an application by the reversioners, to all the interest accrued upon incumbrances prior to that estate for life. The hardship of which, however, is very apparent; for by this means the tenant for life may lose all his interest.

But then it should be remembered that in every case where the profits of an estate are insufficient to answer the interest of an incumbrance, both the tenant for life, and the incumbrancers, have a right to have the estate sold, and what remains after discharging the incumbrances would be put out at interest, and the tenant for life would be entitled to the interest during his life. (a)

If a mortgagee purchase the estate of a tenant for life, he must apply the rents and profits not only in keeping down the interest which may accrue due after his purchase, but if there be any surplus of profits he must apply such surplus in reduction of any arrears which may have become due before his purchase; and it will be the same thing whether he claim to hold as purchaser or mortgagee. (b)

Nothing is more clear than that if a tenant for life, of an estate subject to a mortgage, continues in possession, and does not apply the rents and profits in keeping down the interest of the mortgage, that as between the mortgagee and the estate, the mortgagee will have a right to be paid out of the estate, into whose hands soever it may come. Therefore, the remainder-man may file a bill against a tenant for life, or his executors, to answer for what may have accrued. (c)

(a) 5 Ves. 107. *Thynn v. Duval*, 2 Vern. 117. *Warburton v. Warburton*, 2 Vern. 420. 1 Bro. C. C. 218. 99. *Corbett v. Barker*, 3 Anstr. 755, 759. S. C. 1 Anstr. 138.

(c) 5 Ves. 106. 1 Ves. 480. 3 P. Wms. 235. 3 Mer. 566.

(b) *Penhryn v. Hughes*, 5 Ves.

But as a tenant in tail has an estate, which may last for ever, and the remainder over is not assets, nor regarded in law, and as such tenant in tail has a power over the estate, to commit any waste or spoil thereon, a court of equity has never enjoined him to keep down the interest; so that if tenant in tail lets the interest run in arrear, neither the issue in tail nor the remainder-man can come against their ancestor or tenant in tail, to compel the keeping down the interest, nor against the representative of tenant in tail, after his death, to compel the indemnifying and discharging of the estate from that arrear of interest incurred during his possession. (*d*)

An exception has been taken to this rule, in the case of an infant tenant in tail, in which it has been held that the guardian ought to keep down the interest during his non-age, out of the rents of the estate: and that for two reasons; first, because the act of a guardian or trustee of an infant shall not alter his property, or the property of those coming after him. And, secondly, because the remainder-man or reversioner is not in the power of an infant tenant in tail, as he is in that of a tenant in tail of full age. (*e*) But this was decided in a case in which the infant had a large personal estate besides the rents of the real estate; and it was there said by Lord Hardwicke, (*f*) and in a subsequent case held by him accordingly, (*g*) that if an infant tenant in tail had nothing to support him but the rents and profits of real estate, and would starve if they were to be applied to keep down interest, that he would not in that case have directed them to be so applied.

But this obligation of an infant tenant in tail to keep

(*d*) 1 Ves. 480. *Chaplin v. tie v. Lord Abingdon*, 3 Mer. Chaplin, 3 P. Wms. 234, 235. 565, 566.

(*e*) *Sergeson v. Seeley*, 2 Atk. 412. cited 1 Ves. 480. *nomine*, (*f*) 2 Atk. 416. See also 2 Atk. 463.

*Sarjeson v. Cruise*. See also Ber- (*g*) *Revel v. Watkinson*, 1 Ves. 93.

down the interest of a mortgage, if it at all exists, can only be enforced by a remainder-man or reversioner. Therefore, if tenant in tail lives to attain twenty-one, and suffers a recovery, there will be no equity between his real and personal representatives, but they must take the state of things as they find them at his death. And the appointment of a receiver, by order of Court, to keep down the interest of incumbrances, though it may give an incumbrancer a right to avail himself of the order of Court, (*h*) will not vary the rights of the real and personal representatives. (*i*)

A tenant in tail, who is by act of parliament prevented from barring the remainders, is reduced to the situation of a tenant for life, and must keep down the interest. (*j*)

A person seised in fee may let the interest run in arrear to any amount. So the husband of a mortgagor in fee is not obliged to keep down the interest during the joint lives of himself and wife. (*k*)

The enquiries just ended having led us to the conclusion that a tenant for life is not obliged to pay any part of the principal mortgage money, and it having been previously established that a tenant for life may redeem, this seems a proper place for considering in what cases a particular tenant redeeming shall be held to have redeemed, with a view to exonerate the estate from the mortgage money for the benefit of those in remainder. Which will also lead us to consider certain cases wherein a person paying the interest of mortgage money shall be held to have paid it for the benefit of the estate.

(*h*) Upon this point see *Gresley v. Adderley*, Swanst. 573. ante p. 92.

(*i*) *Bertie v. Lord Abingdon*, 3 Mer. 560.

(*j*) *Shrewsbury v. Shrewsbury*, 3 Bro. C. C. 120, 126. S. C. 1 Ves. jun. 227.

(*k*) *Ruscombe v. Hare*, 6 Dow. 21.

All the rules connected with the question, when a person redeeming shall be held to have redeemed with a view to exonerate the estate, are founded entirely upon presumption. For, in the first place, it is held that if a tenant for years or for life, be he tenant for life by act of the party, or by act of law, redeem; since he is only bound to keep down the interest during his time, the presumption is, that he redeemed to answer some particular purpose, as to prevent suits, &c. by foreclosure or ejectment, but what the law will not enquire; (*l*) but that at any rate he did not redeem with any view to exonerate the estate from the principal mortgage money; (*m*) and that, whether he take an assignment of the mortgage or not. (*n*) And, therefore, he may, after such redemption, assign over the mortgage to raise money, to the extent of the prior charge; (*o*) or his executors will have a claim upon the estate for the principal mortgage money, and for arrears of interest thereon, from the time of his decease. (*p*)

But this being presumption only, may be rebutted by evidence *dehors*; and, therefore, where a tenant for life in paying off a mortgage intends to confer a benefit upon those in remainder, the mortgage term should be taken in by a deed reciting the intention, and assigning the term upon trust to attend for the benefit of those in remainder, (*q*) and exonerated from any claim which the tenant for life or his executors may have in respect of the mortgage money or interest.

(*l*) 1 Ves. 481:

(*m*) Amesbury v. Brown, 1 Ves. 481.

(*n*) Redington v. Redington, 1 Ball and Beat. 141. 1 Bro. C. C. 218. 1 Ves. jun. 234.

(*o*) Rayson v. Sacheverel, 1 Vern. 41. 1 Ves. jun. 185. 3 Bro.

C. C. 210. Huntington v. Huntington, 2 Vern. 437. But see Astley v. The Earl of Tankerville, 3 Bro. C. C. 545. and *post* 243.

(*p*) Amesbury v. Brown, 1 Ves. 477.

(*q*) 15 Ves. 173.

But, besides this, the smallest demonstration of an intention to discharge will prevent the representative of tenant for life from coming for the money. As if he pays interest much beyond what the profits of the estate would have discharged. Or if, instead of applying for a sale, he puts himself to great inconvenience to pay off the debt in order to preserve the estate to his family, and that for a period of seventeen years. For these and such like acts are *primâ facie* evidence that he intended to exonerate the estate. (r)

But, notwithstanding acts which *primâ facie* furnish an evidence to exonerate, the tenant for life may at any time afterwards during his life rebut all evidence of this sort by any act which unequivocally demonstrates an intention not to exonerate; as if, after having paid off the money, he calls for an assignment of the mortgage term to a trustee, no length of time will avail against such an express declaration, that the estate shall bear the charge. (s)

Where tenant in tail pays off a mortgage or any other charge, it is a general rule of inference that he does it with an intention to exonerate the estate, because he may make himself absolute owner of it; and, therefore, neither he nor his representatives will be considered as creditors upon the estate: but this rule is capable of being encountered by any evidence to prove the contrary. (t)

If tenant in tail supposing himself to be the absolute owner of the estate, or, in other words, supposing himself entitled in fee simple, pays off a mortgage, and neglects to take an assignment of the mortgage term, and afterwards disposes of his estate by lease and release only; the

(r) Jones v. Morgan, 1 Bro. bury, 3 Bro. C. C. 120. 1 Ves. C. C. 218. jun. 227. 233.

(s) Reddington v. Reddington, (t) Jones v. Morgan, 1 Bro. 1 Ball and Beat. 131. 142. Co<sup>s</sup>. of C. C. 218. 15 Ves. 173.  
Shrewsbury v. The Earl of Shrews-

Court will not decree to the remainder-man a conveyance of the term without his making satisfaction to the personal estate of the tenant in tail for the principal mortgage money; for in this case it is clear he claims against the apprehension and intent of the tenant in tail, and can therefore only claim a conveyance subject to the equitable circumstances. (*u*)

If a tenant in tail, on paying off an incumbrance, takes an assignment of the term in trust for himself, his executors, or administrators, the charge will be held to subsist for the benefit of his personal estate. (*x*)

But if A. makes a mortgage, and devises his estate to his first and other sons successively in tail, and appoints B. executor, and dies, leaving B., his eldest son, and C., his second son; and afterwards B. dies without issue, having appointed C. his executor; and C., who is tenant in tail, and also executor by substitution of A., pays off the mortgage; it will not be presumed that C. paid off the debt out of the assets of A., without some evidence to prove it. (*y*)

Although, as has been stated, a tenant in tail is not obliged to keep down the interest of an incumbrance on an estate; yet, if he does so, it will be presumed that he does it for the benefit of those in remainder and his personal representatives will not be allowed it against the estate. (*z*) And if tenant in tail becomes entitled to any part of the mortgage money, the rents and profits accrued due in his lifetime must go in satisfaction of the interest on that part. (*a*)

So if there be baron and feme, and the husband take in a mortgage of an estate of which the wife is tenant in tail,

(*u*) *Kirkham v. Smith*, 1 Ves. 258. 261.

258.

(*z*) 1 Ball and Beat. 143.

(*x*) 1 Ves. 260.

(*a*) *Bertie v. Lord Abingdon*, 3

(*y*) *Kirkham v. Smith*, 1 Ves. Mer. 560. 569.

and is in receipt of the rents, it will be presumed that he has paid himself the interest of the mortgage out of the rents and profits of the estate ; and, upon a bill exhibited by those in remainder, he will not be allowed interest on the mortgage during the life of his wife, (b) nor, indeed, after the decease of the wife and during the residue of his own life, if he be entitled to hold the estate as tenant by the curtesy. (c) Though the husband of a mortgagor in fee is not obliged to keep down the interest during the joint lives of himself and wife. (d)

A dowress, being only entitled to one-third of the estate during her life, is not obliged to keep down more than one-third of the interest on any charges ; (e) so that, if in order to be let in to her dower she is obliged to pay off a mortgage, she will have a claim on the estate for two-thirds of the interest, and the whole of the principal.

But if a person, who is primarily liable to pay off an incumbrance upon an estate, pays it off, the charge will merge, however limited his interest in the estate may be, and notwithstanding an indication of intention on his part to keep the incumbrance on foot. As if a husband procures his wife to join in a mortgage of her estate for his benefit, and afterwards pays off the money, and takes an assignment of the term to a trustee for himself, the charge will nevertheless be considered to be merged. (f)

So if a man mortgages lands for my debts, and I afterwards pay the debts, and get an assignment of the mortgage, yet the land is discharged. (g)

If a person entitled in fee pays off a mortgage, or if by

(b) *Amesbury v. Brown*, 1 Ves. 1. 21.

477. *Brompton v. Alkis*, 2 Vern. 566.

(c) *Corbett v. Barker*, 3 Anstr. 759.

(d) *Ruscombe v. Hare*, 6 Dow.

(e) *Bankes v. Sutton*, 2 P. Wms. 716.

(f) *Astley v. The Earl of Tankerville*, 3 Bro. C. C. 545.

(g) *Gilb. Eq. Rep.* 69.

any means he becomes entitled to the money due on the mortgage, the charge will merge for the benefit of the estate; and it is no presumption against this rule that the mortgage term has been kept separate from the inheritance. (*h*)

Where a charge is paid off, or a mortgage redeemed, with an infant's *personal* property, it is ordered that it be considered as personal estate for the benefit of the infant: but it does not appear that any such order has ever been made with respect to timber cut on the infant's estate. (*i*)

But the guardian of an infant may, without the direction of the Court, apply the profits of the estate to pay the interest of any real incumbrance, and the principal of a mortgage, because that is a direct and immediate charge upon the land; and it will not be considered as personal estate: but a guardian cannot pay the principal of any other real incumbrance. (*j*)

Where a mortgage is paid off out of a lunatic's personal estate, by order of the Court, the Court will not, during the life of the lunatic, determine whether the payment shall be for the benefit of the lunatic's real or personal representatives, because the question may never arise. But the term, or legal estate of the mortgagee, must be assigned to a trustee "in trust to attend the inheritance, or for the lunatic, his executors, administrators, and assigns, as shall hereafter be determined in the matter of the lunacy, or in any suit to be instituted for that purpose." (*k*)

(*h*) *Donisthorpe v. Porter*, Ambl. 600. S. C. 2 Eden. 162.

(*i*) *Ex parte Bromfield*, 3 Bro. C. C. 516.

(*j*) *Palmer v. Danby*, Cha. Prec. 137. 1 Fonbl. Treat. Eq. 89.

(*k*) *Ex parte Earl Digby*, 1 Jac. and Wal. 640.



WHEN A MORTGAGEE SHALL BE PREVENTED FROM  
CLAIMING INTEREST.

If a mortgagee take a bond for the arrears of interest on a mortgage, and at the same time indorse upon the mortgage deed a receipt for the interest up to that time, he will nevertheless have a claim upon the estate for the interest on the mortgage. (*l*)

But if a mortgagee take a bond from a tenant for life, knowing him to be such, for the arrears of interest, he cannot, as against the remainder-man, charge the estate with the arrears. (*m*)

So, where a son tenant in tail in remainder joined his father in letting in a mortgage on the estate, and the father and son both joined in a covenant to pay the mortgage money and interest, and the mortgagee warranted to the son the payment of a certain annuity out of the lands, and then suffered the father to take the profits of the lands, and failed in payment of the annuity; it was held upon an appeal in Ireland that the mortgagee had no claim on the son for the arrears of interest incurred due during the lifetime of the father tenant for life. (*n*)

If the mortgagee devise to the mortgagor a life interest in a certain sum of money, and afterwards the mortgagor devise the equity of redemption in the mortgages, and die, having exempted his personal estate from payment of mortgages, the devisee of the lands, upon a bill to redeem, cannot have the interest of the legacy set off against the interest on the mortgage money. But in an account be-

(*l*) *Hardwicke v. Mynd*, 1 Austr. Lef. 642.

109. *Barret v. Wells*, Cha. Prec.  
131.

(*n*) *Gay v. Cox*, 1 Ridgw. Par.  
Ca. 153.

(*m*) *Loftus v. Swift*, 2 Scho. and

tween the mortgagor himself and the executors of the mortgagee, the accounts would be taken with a set-off. (o)

If a first mortgagee, with notice of a subsequent mortgage, enter, and then suffer the mortgagor to take the profits for several years, without requiring interest, the lands in the hands of the second mortgagee shall not be charged with any interest for that time, that is, the interest of the first mortgagee shall not affect the lands, so as to keep out the second mortgagee longer than he would have been kept out, if the interest had been duly paid. (p)

Where one is indebted to another for principal and interest, and pays him money generally, it shall be applied in sinking the interest before any part of the principal shall be paid. (q)

And if one is indebted to another on two accounts, one a mortgage and bearing interest, and the other a book debt, which bears no interest, and pays him money generally, it shall be applied in payment of the sum which bears interest; for it is natural to suppose that he would elect to pay off the money which carries interest, rather than that on which no interest is payable. (r)

And if, at the time of payment, he that receives the money declares he receives it on one account, and he that pays it declares he pays it on another, the declaration of the payor shall be preferred. (s)

If the mortgagor tender the money according to the condition, and the mortgagee refuse to receive it, he cannot afterwards demand interest from the time of the tender:

(o) *Pettat v. Ellis*, 9 Ves. 563.

(p) *Bentham v. Haincourt*, Cha. Prec. 30.

(q) *Chase v. Box*, 2 Freem. 261.  
*Bostock v. Bostock*, 8 Mod. 242.  
*Crisp v. Black*, Finch. Rep. 89.

(r) *Heyward v. Lomax*, 1 Vern.

24. 2 Freem. 261.

(s) *Chase v. Box*, 2 Freem. 261.

5 Rep. 117. b. *Anon. Cro. Eliz.* 68.  
*Vin. Abr. tit. Paym.* (n).

but then it is necessary that the tender should be legally made. (*t*)

A tender and refusal, after the condition forfeited, will not have this effect of making interest to cease, unless the mortgagor has given to the mortgagee six calendar months' previous notice of his intention to pay off the mortgagee; and then the tender must be made on the very day on which the notice expires. Otherwise, the refusal of the mortgagee will not prevent him from claiming interest. But a fresh notice for six calendar months will be requisite; at the expiration of which a strict tender must be made. (*u*) The notice should specify both the time and the place of payment. (*x*)

In order, however, to make interest to cease on a tender according to notice and refusal, it is further necessary that the mortgagor should have always kept the money by him ready to pay; and that he should have made no profit of it in the mean time. (*y*)

If a deed of assignment be prepared by the mortgagor, in which there are covenants on the part of the mortgagee, the mortgagor should send a copy of it to the mortgagee a week at least before the time of the tender, that he may have time to advise on it; otherwise a refusal on tender will not prevent a mortgagee from claiming interest subsequently. (*z*)

So, if there be a controversy, to whom the equity of re-

(*t*) *Lutton v. Rodd*, 2 Cha. Ca. 206. *Sir John Austen v. Exors. of Sir Wm. Dollwell*, 1 Eq. Ca. Abr. 318. pl. 9. What shall be a legal tender, see post.

(*u*) *Hix v. Ling*, before Lord Hardwicke, 2 Powell on Mortg. 1009. S. C. stated 5 Supplement to Vin. Abr. 261. 2 Ves. 372. 678.

2 Cas. and Opin. 51, 52. *Giles v. Hall*, 2 P. Wms. 378. *Wiltshire v. Smith*, 3 Atk. 89. *Sharpnell v. Blake*, 2 Eq. Ca. Abr. 603.

(*x*) 2 P. Wms. 378. 3 Atk. 89.

(*y*) *Giles v. Hall*, 2 P. Wms. 378. *Lutton v. Rodd*, 2 Cha. Ca. 206.

(*z*) *Wiltshire v. Smith*, 3 Atk. 89.

demption belongs, no assignment can be made until that point is settled; therefore, the interest of the mortgage will not cease, although the money be tendered to the mortgagee, and he refuse it. (a)

But if the tender be made in consequence of any demand from the mortgagee, or in consequence of any steps taken by him to recover payment of the mortgage money, no previous notice is requisite from the mortgagor to make interest to cease, but he may bring it to him the next day; and if the mortgagee refuses to take it, he cannot afterwards demand interest from the time of the tender. (b) For the reason why six months' notice is requisite, where the mortgagor volunteers the payment, is, that the mortgagee may find another security whereon to invest his money, that it may not be lying dead; and is, therefore, the time allowed to the mortgagee on bills to redeem. But this reason cannot hold where the mortgagee makes the demand. But it seems that an offer from the mortgagor to pay six months' interest in advance, will make any notice from the mortgagor unnecessary. (c)

(a) *Sharpnell v. Blake*, 2 Eq.Ca. 51.

Abr. 603. pl. 34.

(c) 2 Cas. and Opin. 51. See

(b) *Sharpnell v. Blake*, 2 Eq.Ca.

this opinion stated post.

Abr. 603. pl. 34. 2 Cas. and Opin.

## CHAPTER VI.

## OUT OF WHAT FUNDS MORTGAGES SHALL BE PAID.

THE questions which have arisen concerning the funds, out of which mortgages are to be paid, are necessarily confined to the mortgagor and persons claiming under him; for, as to the mortgagee, it is very clear that he may resort for payment to any of the property comprized in the mortgage, or attach the personal estate of the mortgagor by proceeding on the bond or covenant for payment.

If the mortgagor has bound himself and his heirs by obligation or covenant, it is discretionary with the mortgagee whether he proceeds against the heir or executor. *(a)* But if he proceeds against the heir, the heir will be entitled to be reimbursed out of the personal estate. *(b)*

If a man mortgages his estate without covenant; yet, because the money was borrowed, the mortgagee becomes a simple contract creditor. *(c)* And the mortgagor is

*(a)* 4 Edw. 4. 25. 1 Ander. 7. pl. Hard. 512. 1 Cha. Ca. 271. For. 13. S. C. Benl. 96. S. C. nom. 54. Armitage v. Metcalf, 1 Cha. Ca. Quarles v. Capell, Dy. 204. b. 74.

Haight v. Langham, 3 Lev. 303, (c) Per Lord Thurlow, in Duke of Lancaster v. Mayer, 1 Bro. C. C. 304. 2 Atk. 435.

*(b)* 2 Freem. 204, 205, 208. 464.

bound to make good the money, though the land be a defective security, and there be no covenant. (*d*) But without a covenant or bond, in which the *heir* is named, the mortgagee has no claim on the real assets of the mortgagor. (*e*)

As between the real and personal representatives of the mortgagor the personal estate is the fund first applicable to the payment of the mortgage money; for the personal estate having received the benefit of the loan, it is but reasonable, that, that should be primarily liable to exonerate the real estate. And this will hold equally in favour of an *hæres natus* or heir by descent, as of an *hæres factus*, a general devisee, and a devisee of particular lands. (*f*) And that, whether there be a bond or covenant for payment of the mortgage money, or not. (*g*)

And being the personal debt of the mortgagor, the personal estate must be first applied in payment of the mortgage money and interest, in preference to the widow's customary moiety in the province of York; (*h*) or the customary or orphanage part by the custom of London; for the custom cannot take place until after the debts

(*d*) *Cope v. Cope*, 2 Salk. 449.

(*e*) *Lloyd v. Thursby*, 1743, MS. Rep. stated 2 Cru. Dig. 163. 2nd edit. only. 1 Bro. C.C. 464. 8 Ves. 394.

(*f*) *Pockley v. Pockley*, 1 Vern. 36. 2 Cha. Ca. 84. *White v. White*, 2 Vern. 43. *Johnson v. Milksop*, 2 Vern. 112. *Lady Gainsborough's case*, 2 Freem. 188. 1st Resol. *Hawes v. Warner*, 2 Freem. 277. *Bishop v. Sharp*, 2 Freem. 276. *Fox v. Fox*, 1 Atk. 463. *Bartholomew v. May*, 1 Atk. 487. *Reeves v. Herne*, 4 Vin. Abr. 457. pl. 12. That the rule with respect

to a devisee or *hæres factus* was formerly otherwise, see *Galton v. Hancock*, 2 Atk. 436. *Cornish v. Mew*, 1 Cha. Ca. 271. 2 Freem. 188. See also *Howel v. Price*, 1 P. Wms. 291. S.C. Cha. Prec. 477. *Lord Portsmouth v. Lady Suffolk*, 1 Ves. 31. *Robinson v. Gee*, 1 Ves. 251. 2 Bro. C.C. 263.

(*g*) *Cope v. Cope*, 2 Salk. 449. *King v. King*, 3 P. Wms. 358. 1 Vern. 436. *Meynel v. Howard*, Cha. Prec. 61. 1 Cox 239.

(*h*) *Pockley v. Pockley*, 1 Vern. 36. S.C. 2 Cha. Ca. 84.

paid. (i) So the personal estate must exonerate the real, though by this means the younger children be left destitute. (k)

And though the security be taken in the nature of a Welch mortgage, in which there is neither bond nor covenant for payment, yet it is so far the debt of the mortgagor that the personal estate shall be first applicable in case of the real. (l)

But this rule of exonerating the real out of the personal estate goes no farther than as between the heir or devisee of the estate and the personal representative, or general or residuary legatee; for the land cannot be exonerated out of the personal estate so as to disappoint any of the debts or legacies, whether specific or pecuniary, (m) and much less the widow's right to paraphernalia. (n) And, moreover, it is in the power of the mortgagor to exempt his personal estate from the payment of the mortgage money, that is, as between his real and personal estates, he may throw the burthen on the real; for, as against the creditor or mortgagee, he cannot exempt. (o)

And this exemption may be effected, either by express words, which is the safer and better mode, or by evidence of intention very clearly manifested. If a mortgagor, either by will or in his lifetime, charges his real estate,

(i) Ball v. Ball, before Lord Macclesfield, 1720, cited 2 P. Wms. 335.

(k) Sir Peter Soame's case, cited 1 P. Wms. 694. Philips v. Philips, 2 Bro. C. C. 273.

(l) Howel v. Price, Cha. Prec. 477. S. C. 1 P. Wms. 291. 1 Ves. 406.

(m) 2 Ves. Jun. 65. Rider v. Wager, 2 P. Wms. 335. Cope v. Cope, 2 Salk. 449. Oncal v. Mead,

1 P. Wms. 693. Tipping v. Tipping, 1 P. Wms. 730. Davis v. Gardiner, 2 P. Wms. 190. Bartholomew v. May, 1 Atk. 487.; and see post. 254.

(n) Tipping v. Tipping, 1 P. Wms. 730.; and Puckering v. Johnson, before Lord Macclesfield, there cited. Tynt v. Tynt, 2 P. Wms. 542.

(o) 3 P. Wms. 325. Amb. 37. Ca. Temp. Talb. 208.

or any part thereof, with the payment of his debts, or creates a trust of the inheritance, or a term for the purpose of raising a fund, by sale or otherwise, for the payment of his debts; yet, neither of these will exempt the personal estate: but it must be first applied, because it is the natural fund for the payment of debts. (*p*)

And though the mortgaged land be devised expressly *subject to the incumbrance*, yet, the personal estate must exonerate the lands; for from this expression no more can be collected than what would have been implied, for the testator could not do it otherwise. (*q*)

So, if a testator expressly exempts his personalty from the payment of mortgages, and devises the mortgaged lands *subject to the incumbrances*, the lands descended shall be liable to pay off the mortgage money in favour of the de-

(*p*) Anon. 2 Ventr. 349. Gower v. Mead, Cha. Prec. 2. Dolman v. Smith, Cha. Prec. 456. S. C. 2 Vern. 740. S. C. 1 Dick. 26. Lord Gray v. Lady Gray, 1 Cha. Ca. 297. French v. Chichester, 2 Vern. 568. S. C. affirmed, 1 Bro. P. C. 192. Lovel v. Lancaster, 2 Vern. 183. Raithby's Edit. which three last were cases of a trust of the inheritance created during life. Cook v. Gwavas, stated 9 Mod. 187. Case of a trust of a term created during life. Hall v. Brooker, Gilb. 72. Nokes v. Derby, 11 Vin. 172. pl. 43. S. C. 2 Eq. Ca. Abr. 500. pl. 30. S. C. 3 Bro. P. C. 290. fol. ed. Haslewood v. Pope, 3 P. Wms. 322. S. C. Forrester 204. Middleton v. Middleton, 2 Freem. 189. Fereycs v. Robinson, Bunb. 301. 2 Atk. 273. 625. Bridgman v. Dove, 3 Atk. 201. Troughton v. Trough-

ton, 3 Atk. 656. S. C.; not so well reported, 1 Ves. 86. Earl of Inchi-quin v. French, or O'Brien, Amb. 33. S. C. 1 Wils. 82. S. C. 1 Cox 1. Bromhall v. Wilbraham, Forrester 274. Samwell v. Wake, 1 Bro. C. C. 144. Duke of Ancaster v. Mayer, 1 Bro. C. C. 454. Gray v. Minnethorpe, 3 Ves. 103. Brummell v. Prothero, 3 Ves. 111. Tait v. Lord Northwick, 4 Ves. 816. Hartley v. Hurle, 5 Ves. 540. Brydges v. Phillips, 6 Ves. 567. Bell v. Phyn, 7 Ves. 458. Watson v. Brickwood, 9 Ves. 447. Tower v. Lord Rous, 18 Ves. 132. Aldridge v. Lord Wallscourt, 1 Ball and Beat. 312.

(*q*) Serle v. St. Eloy, 2 P. Wms. 386. Kinnoul v. Duplin, cited and stated 3 Bro. C. C. 206, 207. Astley v. Earl of Tankerville, 3 Bro. C. C. 545.



visée. (r) For the expression *subject to incumbrances* makes no difference; and lands descended must exonerate mortgaged lands devised, whenever the personalty is exempt or exhausted. (s)

But, if one seized of different real estates expressly devises a *part* of them only for the payment of debts, so as to make it a particular or special fund to discharge debts, next to the personal estate, the produce arising from such particular or special fund, whether in the hands of the heir or of a devisee, shall be liable to discharge the mortgaged lands. (t)

And, next to lands expressly devised for the payment of debts, it is held that lands descended shall be real assets; and, as such, liable to exonerate mortgaged lands devised; although the mortgaged lands be devised subject to a general charge for payment of debts. (u) And it makes no difference whether the lands descended were purchased by the testator before or after making of his will. (w) For real estates specifically devised, subject to, or only *generally charged* with, debts, are not to be applied in payment of debts until all other funds, and consequently the real estate descended, has been exhausted. (x)

(r) *Barnewell v. Lord Cawdor*, 3 Mad. 453.

(s) *Galton v. Hancock*, 2 Atk. 430. and see *post*.

(t) *Tweedale v. Coventry*, 1 Bro. C. C. 240. *Bartholomew v. May*, 1 Atk. 487. *Bateman v. Bateman*, 1 Atk. 421. and *Sanders'* note there. *Lanoy v. Athol*, 2 Atk. 444. *Sanders'* edit. *Lovel v. Lancaster*, 2 Vern. 183. and *Raithby's* note thereto. *Powis v. Corbet*, 3 Atk. 556. *Donne v. Lewis*, 2 Bro. C. C. 257. *Manning v.*

*Spooner*, 3 Ves. 114.

(u) *Galton v. Hancock*, 2 Atk. 430. *Corbet v. Kynaston, or Powis v. Corbet*, 3 Atk. 556. *Davies v. Topp*, 1 Bro. C. C. 524. S. C. 2 Bro. C. C. 259. note. *Wride v. Clark*, 2 Bro. C. C. 261. note. *Donne v. Lewis*, 2 Bro. C. C. 257. *Manning v. Spooner*, 3 Ves. 114.

(w) 2 Bro. C. C. 262. *Tweedale v. Coventry*, 1 Bro. C. C. 240. *Manning v. Spooner*, 3 Ves. 114.

(x) *Palmer v. Danby*, 1 Atk. 505. *Davies v. Topp*, 1 Bro. C. C.

Where a testator gives a legacy, he clearly shews an intention to exonerate his personal estate to the extent of this particular legacy, be it specific or pecuniary. (*y*)

So if personalty be bequeathed by a very general description, or by words which are more applicable to a residuary disposition ; yet if it can be collected from the words of the will that the testator contemplated a specific legacy, exempt from debts, the personalty will be taken, discharged of any claim in favour of real estates devised for the payment of debts. And this, though the personalty be given to one who is afterwards constituted executor. (*z*) But in the general cases of a bequest of personalty to an executor, and particularly if the bequest takes place by the mere nomination of one as executor, the Court considers that the executor takes in his character of executor ; and will, therefore, direct the personalty to be first applied to pay debts, notwithstanding a part of the real estate is expressly devised for that purpose. (*a*) Where a testator has charged his real estates with the payment of his debts, and given

526, 527. *Donne v. Lewis*, 2 Bro. C. C. 263. *Manning v. Spooner*, 3 Ves. 117, 118. *Hughes v. Doubben*, 2 Bro. C. C. 614. *Forrester v. Leigh*, Amb. 174.

(*y*) 2 Ves. jun. 65. and see *supra*. 251.

(*z*) *Burton v. Knowlton*, 3 Ves. 107. 18 Ves. 138, 139. Cha. Prec. 549. *Attorney General v. Barkham*, cited Ca. temp. Talb. 207. commented on by Lord Talbot, *ibid.* 210. *Stapleton v. Colvile*, Ca. temp. Talb. 202. *Walker v. Jones*, 2 Atk. 624. S. C. 1 Wils. 24. *Adams v. Meyrick*, 2 Atk. 626. note. S. C. 1 Equ. Ca. Abr. 271. pl. 13. *Bicknel v. Page*, 2

Atk. 79. *Anderton v. Cook*, cited 1 Bro. C. C. 456. *Waise v. Whitfield*, 2 Eq. Ca. Abr. 374. pl. 22. 8 Vin. Abr. 237. pl. 19. *Bradnox v. Gratwick*, cited 3 P. Wms. 325.

(*a*) *Gower v. Mead*, Cha. Prec. 2. *Mead v. Hide*, 2 Vern. 120. *Dolman v. Smith*, Cha. Prec. 456. *Hall v. Brooker*, Gilb. 72. *French v. Chichester*, 2 Vern. 568. *Lucey v. Bromley*, Fitzg. 41. *Cutler v. Coxeter*, 2 Vern. 302. *Gray v. Minnethorpe*, 3 Ves. 103. *Brummell v. Prothero*, 3 Ves. 111. And see *Arnold v. Chapman*, 1 Ves. 108. *Bowaman v. Reeve*, Cha. Prec. 577.

his personalty to another, the circumstance that the personalty was too small to pay the debts has in many cases been admitted as evidence to shew that he intended to discharge his personal estate from the debts. And it has been said that he must mean this or nothing. (b) And to this circumstance Lord Talbot is made to attach some weight. (c) But, according to the modern rule, the amount of the debts will make no difference in the construction of a will of this sort. (d) And, although formerly it was held that parol evidence was admissible, to shew that an executrix legatee was to have the personal estate exempt from debts; (e) yet it is now clearly established that the intention to exempt must appear from the will itself, and cannot be collected from extrinsic circumstances. (f)

One of the reasons upon which the Court proceeds in holding the personalty not exempt, where a testator charges or devises lands for the payment of debts, is, that these acts of the testator are viewed as indicative only of an intention to create an additional fund for the payment of debts. (g) But if a testator, instead of charging or devising lands for the payment of debts, expressly declares that his debts shall be paid out of his *real* estate, there it

(b) *Bamfield v. Wyndham*, Cha. Prec. 101. *Wainwright v. Bendloe*, 2 Vern. 718. S. C. *Gilb.* 125. S. C. *Amb.* 581. *Kynaston v. Kynaston*, cited and stated 1 Bro. C. C. 456, 457. note. 2 Atk. 627, three first lines. *Holiday v. Bowman*, cited 1 Bro. C. C. 145.

(c) See his decree in *Stapleton v. Colville*, Ca. temp. Talb. 202.

(d) *Samwell v. Wake*, 1 Bro. C. C. 144. *Stephenson v. Heathcote*, cited and stated 1 Bro. C. C. 466, and Lord Thurlow's judgment

there. *Philips v. Philips*, 2 Bro. C. C. 273.

(e) *Gainsborough v. Gainsborough*, 2 Vern. 252. S. C. 2 Freem. 188. *Crompton v. North*, 1 Cha. Ca. 196. S. C. 2 Vern. 253, 254.

(f) *Aldridge v. Wallscourt*, 1 Ball and Beat. 312. Lord Thurlow's judgment in *The Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454. *Stephenson v. Heathcote*, 1 Bro. C. C. 466. and see 3 Ves. 106. *Brummell v. Prothero*, 3 Ves. 111.

(g) 11 Ves. 186. 4 Ves. 90.

seems that the debts will be laid upon the real estate only, for in such case the real estate seems to be particularly appropriated, and from that very appropriation the personal estate is exempt. (*h*) So if a testator devises his real estates upon trust to sell and raise money to pay off a *particular* mortgage debt, and a *particular* legacy, and afterwards devises his personalty subject to debts and legacies; in this case, both the mortgage debt and particular legacy are a burthen upon the real estate exclusively; and, if so, the personal estate is exempted, and this construction will not be varied by the subsequent direction to pay all debts and legacies out of the personal estate. And an intention to exonerate the personal estate may be found not merely in the mode in which the personal estate is given, but also in the mode in which the real estate is given, or the application directed to the payment of a debt. And a direction to sell for the payment of a particular debt affords a very different inference from a direction to sell for payment of debts generally. So the devise upon trust to sell and pay off a mortgage is very different from a devise *subject to* a mortgage. (*i*) In like manner a devise of real estates upon trust to sell, and “when sold, the money to be applied to the payment of mortgages, and all other debts,” is a particular appropriation, and will exempt the personal estate. (*k*)

Where a testator has expressly charged his real estate

(*h*) Gaskill v. Hough, in the 179. Burton v. Knowlton, 3 Ves. Exch. Feb. 1774, cited by the Mas- 107. Amesbury v. Brown, 1 Ves. ter of the Rolls, in Burton v. 482. Ward v. Dudley, 2 Bro. C. C. Knowlton, 3 Ves. 110, 111. and 316. Reade v. Litchfield, 3 Ves. Brummell v. Prothero, 3 Ves. 113. 475. Phipps v. Annesley, 2 Atk. Donne v. Lewis, 2 Bro. C. C. 257. 57. Heath v. Heath, 2 P. Wms. March v. Fowke, Finch, 414. in 366. Whaley v. Cox, 2 Eq. Ca. which case there were also words Abr. 549.

of exclusion. (*k*) Webb v. Jones, 2 Bro. C. C. 60.

(*i*) Hancox v. Abbey, 11 Ves.

with the payment of a particular mortgage debt, and disposed of his personalty to persons who die in his lifetime, so as to make the bequest of the personalty a lapsed legacy, the personal estate will again become subject to exonerate the real. For although the intent was, that the legatee should take the personal estate exempted from the mortgage debt; it does not follow that the next of kin shall take it so. And the legatee being dead, it is the same thing as if he had said nothing in his will about his personal estate. And then the personal estate must be first applied. (*l*)

Where lands are directed to be sold, and after payment of debts the surplus monies to go with the personal estate, so as to make them one joint fund, there is no reason for distinguishing between the application of the funds; for the person entitled to the residue cannot fail to have the residue of that very fund which the testator has created for the payment of his debts. (*m*)

Our observations hitherto concerning the funds out of which mortgages are to be paid have been entirely confined to cases where the mortgage debt is supposed to be contracted by a person master of both funds; wherein, the rule that the personal estate shall be first applied in payment of the mortgage, is founded on the supposition that the debt is originally a personal one, and the charge on the real estate is merely a collateral security. But in cases where the person mortgaging or covenanting to pay has so mortgaged or covenanted to pay, not for his own benefit, but for the benefit and as a surety for the person who received the money, for the further security or satis-

(*l*) *Hale v. Cox*, 3 Bro. C. C. 540. 546, 547. *Webb v. Jones*, 2 322. *Waring v. Ward*, 5 Ves. Bro. C. C. 60. *Tweedale v. Coventry*, 1 Bro. C. C. 260.

(*m*) *Hartley v. Harle*, 5 Ves.

faction of the mortgagee, or in consequence of some act or charge upon the estate brought on by a prior owner, the rule is entirely otherwise. For in these cases the land is considered the principal, and the covenant to pay only a collateral security; and the personal estate of the covenantor has the same equity to be reimbursed out of the land as the land is entitled to when it is pledged as a collateral security. (*n*)

Thus, where the original debt was contracted by the ancestor, the personal estate of the heir will not be applied in payment of it. As if a grandfather mortgages his estate, and covenants to pay the money, and the land descends to his son, who dies without paying off the mortgage, leaving a personal estate and a son, the intermediate son's personal estate shall not be applied in payment of the mortgage; for the debt was not contracted by him, and so his personal estate derived no advantage from it. (*o*) But if the father had been executor to the grandfather, and the grandfather had left assets to the value of the debt, and the father had converted them to his own use, there so much of the father's personal estate had been liable to the payment of the grandfather's debts; and the grandson could in such case have come upon the father's executors to exonerate the mortgage out of the father's personal estate. (*p*)

And it will not make it the personal debt of the heir, or take away the right which his personal estate has in equity to be reimbursed out of the lands, if, upon an assignment of the mortgage after the ancestor's death, the heir should join in the assignment, and covenant to pay

(*n*) 2 Cru. Dig. 177. s. 24. 1st. 664.

edit. 182. s. 27. 2d edit. Butler's  
note to Co. Lit. 208 b. Cox's note  
to 1 P. Wms. 294. 2 P. Wms.

(*o*) Cope v. Cope, 2 Salk. 449.  
S. C. 1 Eq. Ca. Abr. 270. pl. 3.  
(*p*) Gilb. Lex. Præt. 315.

the money: but such covenant will be considered as entered into for the additional security of the assignee only. (g)

And though the heir, upon an assignment of the mortgage, should borrow a further sum of the assignee, and pledge other estates of his own as a collateral security; yet the circumstance of the additional real security being superadded would not make it the personal debt of the heir; for it does not create the debt, but only operates as collateral to the debt; and nothing makes it his debt so effectually as the covenant to pay. (r) Nor will the personal assets of the heir be liable even to the amount of the additional charge, if it be small in proportion to the sum originally borrowed; for the Court will not raise two presumptions; and the greater sum not being to be accounted for to the estate, it will take it that the rest was not. (s)

So if an heir, from an honourable desire to discharge his ancestor's debts, mortgages the property descended to him from the ancestor, and the whole money raised is so applied, as between the real and personal representatives of the heir, the personal estate will not be applied in aid of the real; and it will be immaterial whether the heir gave any bond or covenant to pay or not. (t)

In like manner where an heir, in order to raise money to discharge a legacy given by his ancestor's will, mortgages lands descended to him from the ancestor charged with his ancestor's debts and legacies, the lands will have no claim to be exonerated out of the personal estate of the heir. (u)

- (g) *Bagot v. Oughton*, 1 P. S. C. 1 Cox, 240.  
 Wms. 347. *Evelyn v. Evelyn*, 2 (t) *Earl of Tankerville v. Faw-*  
 P. Wms. 659. S. C. *Fitzg.* 131. cet, 1 Cox, 237. S. C. 2 Bro. C. C.  
*Leman v. Newnham*, 1 Ves. 51. 57.  
 (r) *Duke of Ancaster v. Mayer*, (u) *Hamilton v. Worley*, 2 Ves.  
 1 Bro. C. C. 454. 464. jun. 62. S. C. 4 Bro. C. C. 199.  
 (s) *Lewis v. Nangle, Amb.* 151.

In all these respects a devisee of an estate is considered in the same situation as the heir. For if a devisee of an estate subject to the testator's debts mortgages to raise money to answer those debts, (*x*) or gives a bond, (*y*) or promissory note, (*z*) to answer the debts or a legacy charged by the testator on the lands; yet in every of these instances the real estate of the testator will be considered as the primary fund for payment, and the personal estate of the devisee as the collateral or auxiliary fund only. So if a devisee, upon an assignment of a mortgage, joins in the deed and covenants to pay the mortgage money, with four per cent. interest, and afterwards, by another deed, covenants to raise the interest to five per cent. both the mortgage debt, the four per cent. interest, and the additional interest, will be a charge on the lands primarily; for the interest must follow the nature of the principal, and the contract for the additional interest turning upon the same subject must be in the nature of a real charge. (*a*)

In no case where a mortgage is a charge in the first instance on the real estate, will an intention to exonerate the real estate at the expence of the personal be collected, from the heir having subjected both his real and *personal* estates to the payment of his debts: but it must remain charged on the estate originally liable to it. (*b*)

Lord Northington is reported to have said, that “ when

(*x*) *Perkins v. Bayntun*, cited and stated in Cox's note, 2 P. Wms. 664.

(*y*) *Basset v. Perceval*, 1 Cox, 268. S. C. Cox's note, 2 P. Wms. 665.

(*z*) *Mattheson v. Hardwick*, stated Cox's note, 2 P. Wms. 665.

(*a*) *Shafto v. Shafto*, 1 Cox, 207. S. C. Cox's note, 2 P. Wms. 664.

1 Ves. 53.

(*b*) *Lawson v. Hudson*, 1 Bro. C. C. 58. affirmed in D. P. 7 Bro. P. C. 511. *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454. *Hamilton v. Worley*, 2 Ves. jun. 62. S. C. 4 Bro. C. C. 199. *Leman v. Newnham*, 1 Ves. 51. and see *Butler v. Butler*, 5 Ves. 534.



an heir inherits a mortgaged estate, he makes the debt his own by covenant and bond, and a *new equity of redemption*: his personal estate is therefore liable to pay; he has by his own act willed it so.” (c) But then his Lordship’s words must be taken with some limitation. For if, upon the instrument or other acts of the heir, it appears that it was his intention to make the debt his own; there, without doubt, it is not necessary to go to a new equity of redemption to make the mortgage debt the debt of the heir: but if it appears that the heir has made a new mortgage in order only to pay off a former mortgage, made by his ancestor, and without any intention of transferring the debt from the real estate descended to his own personal estate, in such case neither a bond, nor covenant, nor a new equity of redemption, will of themselves make it the personal debt of the heir. And this I think is proved, not only from the case of the Duke of Ancaster v. Mayer, above cited, (d) where the heir joined in the assignment of a mortgage, and gave an additional security on his own estates, which was held not sufficient to make it his personal debt; but also from Perkins v. Bayntun, (e) where a testator having mortgaged his estate for 1500*l.*, devised it, subject to a trust by felling timber to pay his debts, and to a trust for maintaining his daughter, to J. B. in fee. The devisee after his death paid off 500*l.*, part of the 1,500*l.*; and afterwards borrowed a further sum of 2,500*l.* which was mentioned in the mortgage deed to be borrowed for payment of the testator’s debts. And it was held by Lord Bathurst that the 1,500*l.*, part of the 3,500*l.*, was to remain a charge on the real estate. Afterwards the cause coming on, upon a rehearing, it was decided that the additional charge, as well as the 1,500*l.*, was

(c) Donisthorpe v. Porter, Amb.  
600. S. C. 2 Eden, 162.

(d) Ante, p. 259.

(e) Cox’s note, 2 P. Wms. 664.

a remaining charge on the real estates. Besides, Lord Northington had decided the case of *Donisthorpe v. Porter*, upon another point, and was never called upon to determine whether a *new equity of redemption* would make it the personal debt of the heir.

So if a testator devise renewable leaseholds, charged with a legacy, and the devisee renews, the renewed lease, and not the personal estate of the devisee, will be the fund charged with the legacy ; though previous to the renewal the devisee had given a bond for payment of the legacy, with interest. (*f*)

If, upon the death of an ancestor mortgagor, part of his real estates be set apart as a fund for the payment of his debts, and afterwards the heir disposes of that fund as discharged from the charge, it is but just that the personal estate of the heir, which has had the benefit of the sale, should be answerable for the ancestor's debts. (*g*)

Where a man purchases an equity of redemption, subject to a mortgage, and the mortgage money forms no part of the consideration money for the purchase, the mortgage is considered merely as a real incumbrance upon the estate, and not as a personal debt of the purchaser. And so it will be, though the purchaser covenant to pay the mortgage money, and to indemnify the vendor therefrom. (*h*)

But it is otherwise if the mortgage money form any part of the consideration money for the estate. As if one contracts to purchase an estate, subject to a mortgage, for 90*l.*, and to pay 86*l.*, part thereof to the mortgagee, and 4*l.*, the residue, to the vendor ; in this case the pur-

(*f*) *Billingham v. Walker*, 2 Bro. C. C. 604.

(*g*) *Lord and Lady Effingham v. Napier*, 3 Bro. P. C. 1. S. C. cited *Fitzg.* 142. 144. 2 P. Wms. 664.

(*h*) 2 Bro. C. C. 608. 1 Bro. C. C. 464. *Forrester v. Leigh*, Amb. 171. *Tweddell v. Tweddell*, 2 Bro. C. C. 101. *Butler v. Butler*, 5 Ves. 534.

chaser makes his personal estate primarily liable to pay off the mortgage; it being nothing more than if one were to contract to buy an estate, and die before the purchase money paid, where the heir is entitled to have the purchase money paid out of the personal estate. (*i*) So in this case, though there be no bond or covenant for payment or to indemnify the vendor, yet if the mortgage money be discounted out of the purchase money, the mortgage becomes the personal debt of the purchaser. (*k*)

But, whether the mortgage money be discounted out of the purchase money or not, yet if the purchaser, by any communication with the mortgagee, take the debt upon himself, so as to give the mortgagee a right to sue him for the mortgage debt at law, he will be considered to have made the debt his own; and, as between his real and personal representatives, his real estate will be only the auxiliary fund for payment. (*l*)

But a covenant with a vendor mortgagor only to pay the mortgage will not enable the mortgagee to sue the purchaser at law, though under such covenant the mortgagee might oblige the mortgagor to let him make use of his name to recover the money. (*m*)

Where the debt is not the personal debt of the purchaser, no intention, as between his real and personal representatives, to throw the mortgage debt upon his per-

(*i*) *Parsons v. Freeman*, Amb. 115. The principle and authority of which is allowed in all the cases cited in the last, and in the next note but one. *Earl of Belvidere v. Rochfort*, 6 Bro. P.C. 520. *Cope v. Cope*, 2 Salk. 449.

(*k*) *Earl of Belvidere v. Rochfort*, 6 Bro. P.C. 520.

(*l*) *Woods v. Huntingford*, 3 Ves. 128. *Waring v. Ward*, 5 Ves. 670. and 7 Ves. 332. *Lord Oxford v. Lady Rodney*, 14 Ves. 417.

(*m*) *Parsons v. Freeman*, Amb. 115. And see *Roach v. Wadham*, 6 East. 289.

sonal estate will be inferred by his having directed that his debts should be paid out of his personal estate. (*n*)

Where a wife joins her husband in a mortgage of the wife's estate for the benefit of the husband, as between the husband and wife, the mortgage is considered a debt of the husband; and after the death of the husband the wife or her real representative will be entitled to stand in the place of the mortgagee, and to have the mortgage satisfied out of the personal and real assets of the husband. And this claim of the wife to have the mortgage satisfied out of the assets of the husband shall be preferred to any legacies given by the husband, though to a charity, for she stands in the place of a debtor; and every thing shall be taken favourably for the wife, who, for the supplying the husband's occasions, has agreed to charge her land with a debt of his. (*o*)

It was held by Lord Cowper that all other debts of the husband should be preferred to this: (*p*) but Lord Hardwicke has been made to say, that none of his creditors have a right to stand in the place of the mortgagee to come round on the wife's estate. (*q*)

It is the fact of the husband's having received the money, or the mortgage having been made for his benefit, that decides that a wife shall have her lands exonerated out of the assets of the husband; and therefore, if it can appear that the mortgage was made to pay off a debt contracted by the wife *dum sola*, the husband's assets shall not be liable to

(*n*) *Butler v. Butler*, 5 Ves. 534.  
*Ancaster v. Mayer*, 1 Bro. C. C. 454.

(*o*) *Huntingdon v. Huntingdon*, 2 Vern. 436. S. C. 1 Bro. P. C. 1.  
*Pocock v. Lee*, 2 Vern. 604. *Tate v. Austin*, 1 P. Wms. 264. *Par-*

*tericke v. Powlet*, 2 Atk. 383.  
*Astley v. Earl of Tankerville*, 3 Bro. C. C. 545.

(*p*) *Tate v. Austin*, 1 P. Wms. 265.

(*q*) *Robinson v. Gee*, 1 Ves. 252.

exonerate the lands, but the wife and her heirs must take it *cum onere*. (r) So, if most part of the money raised was for the benefit of the wife, and to pay off a debt of her's *dum sola*, though the husband may have received some part of it, and given a bond or covenant to pay the whole, yet the land must bear the burthen; for the greater part being manifestly not to be accounted for by the husband to the wife's estate, the Court will take it that the rest was not. (s) So if at the time of the mortgage the husband makes a settlement on the wife, he will be considered a purchaser of the money borrowed; and the wife's lands will have no claim against his assets. (t) So, if an estate in mortgage descend to the wife, and the husband upon an assignment of the mortgage covenant to pay the money, yet this will not make it the debt of the husband in favour of the wife, or her heir. (u) And Lord Hardwicke was of opinion that if husband and wife join in a mortgage of the wife's lands, to pay the debt of the wife *dum sola*, and the husband give a bond to pay, and afterwards he is sued at law upon the bond, that he might have relief in Chancery, to be repaid out of the wife's estate. (x)

It is not necessary that it should appear on the face of the mortgage deed for whose use the money was borrowed, or how it was applied: but it may be proved by evidence *aliunde*. And it will as effectually discharge the husband's assets from any claim in favour of the wife or heir. (y) So Lord Loughborough, Chancellor, in *Clinton v. Hooper*, (z)

(r) See the Reporter's inference from *Bagot v. Oughton*, 1 P. Wms. 347.; and case in next note.

(s) *Lewis v. Nangle*, Amb. 150. S. C. 1 Cox, 240.

(t) *Lewis v. Nangle*, Amb. 150. S. C. 1 Cox, 240. S. C. 2 P. Wms. 664. note.

(u) *Bagot v. Oughton*, 1 P.

Wms. 347.

(x) *Lewis v. Nangle*, Amb. 150. S. C. 1 Cox 240. S. C. Stating the facts, 2 P. Wms. 664, in note.

(y) *Kinnoul v. Money*, cited 1 Ves. Jun. 186, 187. S. C. cited 3 Bro. C. C. 212, 213.

(z) 1 Ves. Jun. 188.

addressing himself to a case, put *arguendo* by the solicitor-general, of money paid to the wife without writing, and with the privity of the husband; and, if made out satisfactorily to the Court, that she could dispose of it as she pleased; or suppose she kept it herself, so as to be able to make a will, &c. with all the consequential rights of personal estate, said, "I see no reason why the Court should not, proceeding upon the same principle, declare, that that money was not the debt of the husband. It being transferred to her, and so as to be attended with all the equitable consequences of separate estate, it never was his; so the whole obligation upon him consisted in his covenant. And if by a distinct transfer and independent transaction, without any relation to the original matter, she having absolute power to dispose, gave it to the husband, that circumstance, perhaps, would not reach back to the original contract."

But if upon the face of the mortgage deed the money appears to have been borrowed for the use of the husband, which is corroborated by all the other evidence, by the better opinion, parol evidence is inadmissible of any declaration made by the wife, that the money was intended as a gift to the husband. (a) So Lord Hardwicke doubted whether parol evidence was admissible to shew the intent of the parties to charge the estate of a tenant in tail in remainder, who had joined the tenant in tail in possession in mortgaging, and to rebut his equity, to have the estate disencumbered out of the assets of the tenant in tail in possession, against an express writing that the money was received by the tenant in tail in possession only, and against all the other facts subsequent and concomitant. (b)

(a) *Clinton v. Hooper*, 1 Ves. 251. See this case cited ante in Jun. 173. S. C. 3 Bro. C. C. 201. Chap. IV.

(b) *Robinson v. Gee*, 1 Ves.

But if an heir or wife, after the husband's death, promise his executor to relinquish their claim, this will for ever bar them of their right to have the charge paid out of the husband's assets, and parol evidence will be admitted to prove such declaration: for if the heir or wife could retract, a legatee might be liable to refund, or the executor called to an account after having been suffered to lie by, and think himself at rest, which would be injurious to him. And it matters not whether the legacies were paid before or after such disclaimer, by the heir or wife. (*c*)

But the equity of redemption being reserved differently from what the estate would have gone, if no mortgage had been made, will not, of itself, furnish any inference that the money was intended as a gift to the husband. (*d*) Nor will a covenant by the wife, after her husband's death, upon a further advance that the estate shall stand charged with the original and further advance, alter the nature of the original debt, or throw it upon her estate. (*e*)

In consequence of the difficulty respecting the admission of proof in all cases of this sort, it is advisable, wherever the wife intends a gift to the husband, to vest the estate by fine in trustees upon trust by sale or mortgage, to raise so much for the benefit of the husband. And supposing a conveyance made in this manner, it is manifest that it could never be the debt of the husband, but a sum of money to which he would have an original right without any obligation ever to repay. (*f*)

(*c*) *Clinton v. Hooper*, 1 Ves. Jun. 173. S. C. 3 Bro. C. C. 201.

(*d*) *Brend v. Brend*, 1 Vern. 213. S. C. 2 Cha. Ca. 98. 161. *Huntingdon v. Huntingdon*, 2 Vern. 437. *Pocock v. Lee*, 2 Vern. 604. *Corbett v. Barker*, 1 Anst. 138. S. C. 3 Anstr. 755. *Iunes v. Jackson*, 16 Ves. 356. S. C. 1 Bligh 104. *Jack-*

*son v. Parker*, Amb. 687. All which cases are cited, and most of them stated ante.

(*e*) *Jacm v. Mertins*, 1 Ves. 312. S. C. Stating the facts, 3 Atk. 1.

(*f*) 1 Ves. Jun. 188. 3 Bro. C. C. 213.

If a tenant in tail in remainder join with the person entitled to the estate in possession (as is frequently the case between father and son) in letting in a mortgage on the estate, and the tenant in possession receive the money, the tenant in remainder is considered to join only as a surety, and is entitled to have his estate disencumbered out of the assets of the tenant in possession. (*g*) Nor will the tenant in remainder, without an express covenant to pay, be chargeable to the mortgagee, either as a specialty or simple contract creditor. (*h*) And if a father tenant for life make a mortgage by virtue of a power, and upon an assignment after his decease the son covenants to pay, this covenant from the son will be considered only as a surety, and the land the principal debtor. (*i*)

If executors mortgage or deposit their testators' property, together with their own property, for a debt of their own, an equity arises under which those who are entitled to the testator's estate may effectually contend that his estate, if bound by the deposit, shall be relieved by the previous application of the property of the executors deposited at the same time. (*k*)

The principle upon which all these cases proceed is that of principal and surety, which principle is applied in its fullest extent. For if A., upon a promise of repayment by B., mortgage his estate, and B. neither joins in the mortgage nor covenants to pay; yet if B. actually had the money, A. has a claim against B. and his assets, to have the lands disencumbered, as every surety has against his principal. (*l*)

(*g*) *Rosse v. Sterling*, 4 Dow. 442. *Lloyd v. Thursby*, 2 Cru. Dig. 163. 2nd edit. *Robinson v. Gee*, 1 Ves. 251. See also *Gay v. Cox*, 1 Ridg. Par. Ca. 153.

(*h*) *Lloyd v. Thursby*. 2 Cru. Dig. 163. 2nd edit.

(*i*) *Evelyn v. Evelyn*, 2 P. Wms. 659. S. C. *Fitzg.* 131. S. C. 1 Kely. 18.

(*k*) *M<sup>c</sup>Leod v. Drummond*, 17 Ves. 158.

(*l*) *Lee v. Rook*, Mosl. 318.



But where, as between the real and personal estate, the personal estate has received no benefit from the loan, the land will be considered the principal; and the personal estate the auxiliary fund for payment.

As where a person makes a settlement securing a jointure or portions, though there be a covenant to pay, yet must the person, entitled to the jointure or portions, come against the land first. (*m*) And so it would be, if it rested only in articles. (*n*) And after the death of the settlor the remainder-man or heir has no right to have the real estate disencumbered out of the personal. (*o*)

Upon the same ground where one intends another a bounty, and charges his estate for his benefit, the real estate is liable to and must pay the money. (*p*)

We proceed now to cases of contribution, and then to those cases where, in favour of a subsequent mortgagee or creditors, the Court will direct the order in which a mortgagee shall resort to the funds for payment.

Where two different estates are comprized in one mortgage, and upon the decease of the mortgagor they come to different persons, and either by the assets failing, or from the mortgagee resorting to the lands for payment, the mortgage money is to be paid out of the lands, the two different estates must each contribute to pay off the mortgage in proportion to their respective value. So that, if they are of equal value, the debt will be divided between them. (*q*)

(*m*) *Lanoy v. Duke and Duchess of Athol*, 2 Atk. 444. Sander's edit. *Edwards v. Freeman*, 2 P. Wms. 438. 666. *Lucy v. Gardener*, Bunb. 137.

(*n*) *Edwards v. Freeman*, 2 P. Wms. 435. *Countess of Coventry v. Earl of Coventry*, 2 P. Wms. 222. 651. *Eq. Ca. Abr.* 348. S.C. 9

*Mod.* 12. 1 *Stra.* 596.

(*o*) 2 Atk. 445.; and cases in last note.

(*p*) *Wilson v. Earl of Darlington*, 1 Cox 172. S.C. 2 P. Wms. 664. Cox's note.

(*q*) *Aldrich v. Cooper*, 8 Ves. 390, 391. 393.

So, if freehold and copyhold be mortgaged together, and upon the death of the mortgagor one descends to his heir at law, and another to a different person, being his customary heir, and the lands are resorted to for payment, a value must be set upon each estate, and then each shall bear its proportion of the charge. And if the mortgage deed says that for better securing the mortgage money, the mortgagor covenants to surrender, yet must the copyhold contribute in proportion; for the words "for better securing the payment" are not thrown in for the purpose of making the freehold estate applicable first, but the common form of a mortgage of freehold and copyhold estates is to make the freehold liable, with a covenant to surrender the copyhold in order to save the fine. (r)

So where two estates, the one in Norfolk and the other in Suffolk, were, by settlement, made subject to the raising of a portion of 2000*l.* by a term for years that was to commence upon the determination of the estates then in being, both the estates respectively being then subject to jointures and other estates for lives. The Suffolk estate first falling into possession, A., to whom that estate was limited, paid off the portion; afterwards the Norfolk estate descending upon B., the heir of the settlor, A. brought his bill against B., for contribution; and it was decreed that each estate should bear its proportion. But with this, that the term being to commence and take place as the former estates fell in, and the lives upon the Suffolk estate first dying; in the adjusting what proportion each estate was to pay, the Suffolk estate was to be valued as an estate in possession, and the Norfolk estate as an estate in reversion; and so to value what the term, upon each estate respectively, was worth to be sold. (s) In which case we

(r) *Aldrich v. Cooper*, 8 Ves. 382. 384.

*ham*, or *Henningham v. Henningham*, 2 Vern. 355. S. C. but not so

(s) *Heviningham v. Hevening-*

*well* stated, 1 Eq. Ca. Ab. 117. pl. 5.

may observe that, it being upon a settlement, the land was the original debtor.

So if mortgaged lands and unincumbered lands be devised to different persons, but expressly after payment of debts, the mortgaged lands and the unincumbered lands shall contribute in proportion to discharge the mortgage. (*t*)

It is a rule in equity that where one creditor has two funds to resort to, and another creditor but one, the creditor having the two funds must resort to that which the other creditor cannot resort to, and which, paying him, will leave the other fund open for the other creditor. (*u*)

Therefore, if a person having two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, the Court, in order to relieve the second mortgagee, will direct the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons. (*x*) And the circumstance of one estate being freehold and the other copyhold, will make no difference in this arrangement. (*y*)

Upon the like principle, if a mortgagor sells part of the mortgaged estate, though, in respect of the mortgagee, he would have a right to have both parts of the estate liable for his satisfaction; yet, on a bill by him for foreclosure or sale, the equity would be, that the estate sold

(*t*) *Carter v. Barnardiston*, 2 P. Wms. 504. 509. and *Cox's* note there.

(*x*) *Lanoy v. The Duke and Duchess of Athol*, 2 Atk. 446.

(*y*) *Aldrich v. Cooper*, 8 Ves.

(*u*) *Amb. 615. 8 Ves. 391. 395. 388. 395.*  
*Trimmer v. Bayne*, 9 Ves. 209.

should not be liable, unless the other part was not sufficient for the satisfaction. (z)

So in bankruptcy, even the Crown, (who by extent may lay hold of all the property,) has been confined to such property as would leave the securities of incumbrances effectual. (a)

So where there are specialty creditors a mortgagee of freehold and copyhold must take his satisfaction out of the copyholds; for the specialty creditors cannot originally and of themselves resort to the copyholds, for they are not assets. But if the mortgagee should resort to the freehold, the creditors by specialty may stand in his place as to the copyhold lands. (b) And so may the creditors by simple contract, if the mortgagee has a bond or covenant for payment, but not otherwise: for, it is only creditors by specialty that can resort to the real or personal assets; and, having this power of resorting to two funds, they shall resort to that which leaves the personal estate open for the simple contract creditors. (c) But a mortgagee, without either bond or covenant in which the heir is named, is only as a simple contract creditor; and does not hold the lands as assets, but as a pledge. (d) But then we must remember that where a creditor is admitted on another fund from that on which he had an original claim, as standing in the place of another creditor, it is only to the extent of the fund on which his claim originally attached, and which the creditor having two funds has exhausted. (e) So a specific or any other legatee shall

(z) *Kirkham v. Smith*, 1 Ves. 261.

(a) *Per Eldon Chancellor*, in *Aldrich v. Cooper*, 8 Ves. 388, 389.

(b) *Aldrich v. Cooper*, 8 Ves. 382. which over-ruled *Robinson v. Tonge*, stated by Mr. Cox in his

note to 1 P. Wms. 680. 5th edit. *Lanoy v. Athol*, 2 Atk. 444. 446.

(c) *Galton v. Hancock*, 2 Atk. 436.

(d) 8 Ves. 394. *Lacam v. Mertins*, 1 Ves. 312.

(e) *Wilson v. Fielding*, 2 Vern.

in equity stand in the place of a bond creditor or mortgagee, as against real assets descended, and take as much out of such assets as such creditor by bond or mortgage shall have taken from his specific or other legacy. (*f*) But, as against real assets in the hands of a specific devisee, a legatee cannot stand in the place of a bond creditor, though he may stand in the place of a mortgagee: and the reason for this difference is this, that a bond, as a mere specialty debt, is no lien on lands in the hands of the obligor, his heir, or devisee; but a mortgage is a lien and an estate in the land from the first. (*g*) But if, though specifically devised, the land is made subject to debts, that distinguishes the case; and a legatee may stand in the place of any creditor; for, by this means, the testator has created two funds, the lands and the personal estate; and, having devised one subject to debts but the legacy generally, has evidently preferred the legatee to the specific devisee. (*h*)

This rule of allowing a subsequent incumbrancer to stand in the place of a former who has more than one fund, and has exhausted that fund on which only the subsequent incumbrancer had a claim, is a very favourite rule in equity, and has been carried to a great extent. For where the Crown, by an extent, has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour, by

763. and the decree, Raithby's edit.

(*f*) *Tipping v. Tipping*, 1 P. Wms. 730. *Anon.* 2 Cha. Ca. 4. *Culpepper v. Aston*, 2 Cha. Ca. 117. *Lucy v. Gardener*, Bunb. 137. *Lutkins v. Leigh*, Cas. temp. Talb. 53. 8 Ves. 396, 397.

(*g*) *Forrester v. Leigh*, Amb. 171. 174. *Scott v. Scott*, Amb.

383. *Clifton v. Birt*, 1 P. Wms.

678. *Herne v. Meyrick*, 1 P. Wms.

201. S. C. 2 Salk. 416. *Hazlewood v. Pope*, 3 P. Wms. 324. 5th point. 8 Ves. 397.

(*h*) *Hazlewood v. Pope*, 3 P. Wms. 323, 324. 3d point. 8 Ves. 397. *Lutkins v. Leigh*, Ca. temp. Talb. 53.

letting him stand in the place of the Crown upon other funds not comprized in his mortgage; and that even in bankruptcy, in a question with the general creditors. (*i*)

Nay, the rule would be applied, though by this means a subsequent incumbrancer might acquire a right to tack; as suppose a man having a freehold and copyhold estate, mortgages both to A. and afterwards mortgages the freehold only to B., and then dies indebted to B., not only on the mortgage but also on a bond or covenant; in this case B. would have a right to throw A. on the copyhold, being the estate to which he himself has no resort. (*j*)

Where a party is put to his election between two funds by will or otherwise, and having mortgaged one elects to take the other, the estate elected must reimburse the one mortgaged: but then the taker of the mortgaged estate must, as to the mortgagee, take it, subject to the mortgage, for the election cannot affect the right of the mortgagee. (*k*)

A mortgagee of real estates and chattels real in possession or out of possession, and of chattels personal in possession, or what is tantamount to possession, like a judgment creditor, who has actually taken out and served an execution or extent, is not a creditor within the bankrupt act of the 21 of James, c. 19. though he may also have a bond or covenant for payment: (*l*) but he cannot prove as a general creditor, without first giving up his claim to the mortgaged property. (*m*)

The usual course, however, for a mortgagee, where the mortgagor becomes bankrupt, because in general it is

(*i*) Per Lord Eldon, Chancellor, Ves. 65.

and Sir Samuel Romilly, argu. in Aldrich v. Cooper, 8 Ves. 387. 395. (*l*) Jones v. Gibbons, 9 Ves. 407. Ryall v. Rolle, 1 Atk. 165. Sagitary v. Hyde, 1 Vern. 455. S. C. 1 Ves. 348.

(*j*) 8 Ves. 395, 396. post 282. (*m*) Ex parte Grove, 1 Atk.

(*k*) Rumbold v. Rumbold, 3 104.

most for his advantage, is for him to pray a sale under the general order; (*n*) and if that is insufficient to pay his mortgage money, interest, and costs, to come in for the surplus *pari passu* with the general creditors. (*o*)

But a mortgagee who takes a security from two persons, one as principal and the other as surety, need not give up his joint security upon the bankruptcy of the principal, for he may come in as a general creditor; and, if that is insufficient to pay him his whole debt, he may afterwards resort to the surety under his joint security. (*p*)

Where a mortgagor becomes bankrupt before the time appointed for the repayment of the principal mortgage money, yet if the mortgagee has a bond for repayment of the money, and any default has been made in paying the interest according to the express terms of the condition, the mortgagee may prove for the principal sum and the interest then due as a present debt, for one default makes him a legal creditor for the penalty. (*q*)

If a mortgage be made upon a loan of stock, to secure a retransfer, and the mortgagor become bankrupt, the mortgagee will be entitled to prove for such dividends as became due before the bankruptcy, and the value of the stock according to what it is at the date of the commission. (*r*)

A legacy given to discharge a mortgage on a dissenting chapel is void under the statute of mortmain 9 Geo. 2. c. 36.: but whether it can be applied to any other purpose, for the benefit of the charity, is doubtful. (*s*)

(*n*) Lord Loughborough's order, 527. Ex parte Wildman, 1 Atk. 8th March, 1794, stated 4 Bro. 109. Ex parte Parr, 1 Ro. Ba. Ca. C. C. 548. 76.

(*o*) See the general order, 8th March, 1794, and Ex parte Bennet, (*q*) Ex parte Fisher, 3 Mad. 159.

2 Atk. 528. Ex parte Fisher, 3 (*r*) Ex parte Day, 7 Ves. 301.

Mad. 159. (*s*) See Corbyu v. French, 4 Ves. 418.; and the cases there cited.

(*p*) Ex parte Bennet, 2 Atk.

## CHAPTER VII.

## OF TACKING, AND THE PRIORITY OF INCUMBRANCES.

1st. Of the tacking of interest and other incidental expences sustained by one as mortgagee. 2nd. Of tacking where one buys for less than the money due upon the mortgage. 3rd. Of tacking where the same person has two claims, and one of them only is a mortgage or a lien upon land. 4th. Of tacking where the same person has two claims: both mortgages; or one a mortgage, and the other a lien upon land.

OF TACKING OF INTEREST, AND INCIDENTAL EXPENCES  
SUSTAINED BY ONE AS MORTGAGEE.

The interest on mortgage money and the costs of the mortgagee follow the principal money; and will be payable together with it, whenever the principal money becomes payable. Therefore, where there are several mortgagees, they will be entitled to their debts, principal, interest, and costs, according to their respective priorities. (a)

And if a prior mortgagee does not bring an ejectment to recover possession, and the interest runs in arrear, a subsequent mortgagee shall, notwithstanding, not be permitted to redeem him, without paying the whole interest so run

(a) *Wortley v. Birkhead*, 2 Ves. 575.



on; because, though the second mortgagee could not enter, he was not without remedy; for he might have brought a bill to redeem, and so had the estate himself: but if he did not, the Court has often appointed a receiver to keep down the interest, which the Court will not in general do, unless where the prior mortgagee will not enter; but if he does not take that remedy, he shall not redeem without paying that arrear: and the mortgagee often suffers the arrear to run on, with a design to get in the estate, on which he lent his money, and become the purchaser; which may be called an ill intent, yet shall he not lose his interest. And fraud and collusion is never presumed: but must be proved, either expressly or by necessary consequence, from the acts done. (*b*)

Under the head of costs may be ranked all incidental expences sustained by one, in consequence of his being a mortgagee; as fines paid for renewals, (*c*) money laid out by him in repairing, (*d*) in lasting improvements, (*e*) or in performing the covenants of the mortgagor with third persons, as a covenant to build; (*f*) so all money expended by him in defending the mortgagor's title, (*g*) or in being admitted to copyholds, (*h*)—all which a mortgagee will be entitled to tack, or to be paid together with his principal money; and such costs shall carry interest.

But a mortgagee of a bankrupt's estate, though he pays the arrears of rent, that are due to the bankrupt's landlord, unless he applies to the Court for an order that he may stand in the place of the landlord, in consideration of his paying the arrears of rent, shall not be preferred to the creditors under the commission. (*i*)

(*b*) *Aston v. Aston*, 1 Ves. 268.

(*c*) *Manlove v. Ball*, 2 Vern. 84. 436.

*Iacon v. Mertins*, 3 Atk. 4. *Woolley v. Drage*, 2 Anstr. 551.

(*d*) 4 Ves. 482. 3 Atk. 518.

(*e*) *Hardy v. Reeves*, 4 Ves. 482.

(*f*) *Lyster v. Dolland*, 1 Ves. jun.

(*g*) *Godfrey v. Watson*, 3 Atk. 518.

(*h*) 4 Ves. 482.

(*i*) *Anon.* 1 Atk. 102.

OF TACKING WHERE ONE BUYS FOR LESS THAN THE MONEY  
DUE UPON THE MORTGAGE.

AN assignee or a purchaser of a mortgage, who buys it for less than the money due upon it, will be entitled to hold for what is really due upon the mortgage, and not what he gave for it, for the whole money is due from the mortgagor; and he shall not profit himself of the contract of the assignee. (j)

But if A. mortgages to B., and afterwards to C.; and D. purchases in the mortgage to B. at an undervalue, knowing of the mortgage to C., there C. shall redeem paying the money that D. gave, because C. was entitled to the redemption before D. intermeddled, and therefore D. could not intermeddle to crowd out any part of C.'s money that was secured on the estate; and, therefore, if D. has all the money that he laid out upon the purchase of the incumbrance, he ought not to hinder his neighbour from receiving his own money out of the estate; for then D. would receive his own from C. with unlawful usury. But if D. was to receive the money from A., there he should have the whole money that B. lent; because, as far as D. did not purchase at the price originally paid by B., it was the gift of B. But this shall not prevail as a voluntary disposition in the former case, because the money is presumed to be advanced by D. to keep out C. from the redemption. Since he was under no necessity to come into this account, he shall come in as a lender; and so, if he has his principal and interest paid, it is sufficient. But if B. had offered the redemption to C. at the same value he sold it to D., and C.

(j) Phillips v. Vaughan, 1 Vern. 336. Williams v. Springfeild, 1 Vern. 476. Ascough v. Johnson, 2 Vern. 66. Baker v. Hellett, Nels. C. R. 117. S. C., 3 Cha. Rep. 23. Anon. 1 Salk. 155. Bromley v. Holland, 5 Ves. 620.

had refused it, there it had been otherwise; because then there was no injury done to C. by letting in another, when he had refused to take it; and, therefore, D. shall have the whole money due on the mortgage, and not what he gave only. But Chief Baron Gilbert makes a quære: if C. had notice of the whole money lent by B. before he lent any to A. whether D. might not have taken an assignment, and challenged the whole money. (*k*)

It was laid down very generally by Lord Chancellor Jefferies, that where there are subsequent incumbrances or creditors in the case, there a man, that buys in a prior incumbrance, shall be allowed only what he really paid, though there was in truth a greater sum due. (*l*) But this rule has been since very much narrowed; and it is now held that if a prior creditor *bonâ fide*, and without notice of the intermediate incumbrances, buys in a puisne incumbrance, he shall be allowed to hold for all the money really due, though he did not give the full value for it. (*m*)

But still if an agent, a trustee, an heir at law, or an executor, buys in a mortgage or any other incumbrance, or contracts a debt, for less than is really due, he shall not be allowed more than he actually paid, and that whether there are subsequent incumbrances or not. (*n*) Though, from a case in Vernon, it would appear, that if an heir or trustee buys in an incumbrance to protect incumbrances to which he himself is intitled, he might hold for the whole money due, and not only what he gave for it. (*o*)

(*k*) Gilb. Lex Præc. 282, 283.

(*l*) Williams v. Springfield, 1 Vern. 476. Long v. Clopton, 1 Vern. 464.

(*m*) Morret v. Paske, 2 Atk. 52. Long v. Clopton, 1 Vern. 464. 5 Ves. 620. note (*a*).

(*n*) Darcy v. Hall, 1 Vern. 49.

Braithwaite v. Braithwaite, 1 Vern.

334. Long v. Clopton, 1 Vern. 464.

Anon. 1 Salk. 155. Anon. 2 Vent.

353. Morret v. Paske, 2 Atk. 52.

54. Powell v. Glover, 3 P. Wms.

note A.

(*o*) Darcy v. Hall, 1 Vern. 49.

Where one, as guardian to an infant, took an assignment of a mortgage, although the mortgagee had never entered; yet the Lord Keeper is reported to have been of opinion, that as to the profits received out of the mortgaged lands, the guardian should be taken to be in possession as mortgagee, and not as guardian. (*p*) The reporter, however, adds a quære. And from the note to Mr. Raithby's edition of Vernon it appears that the decree directed the mortgagee to account generally; independent of which the law appears otherwise from a case reported in a note to Peere Williams, wherein a guardian compounded debts, and it was decreed for the benefit of the infant. (*q*)

OF TACKING WHERE THE SAME PERSON HAS TWO CLAIMS,  
AND ONE OF THEM ONLY IS A MORTGAGE OR A LIEN  
UPON LAND.

Where a prior incumbrancer by mortgage, judgment, or statute staple, has a bond likewise from the mortgagor, the mortgagor in his lifetime may redeem the mortgage, &c. without paying off the bond debt. (*r*) But if the mortgagor dies, and the equity of redemption descends to the heir at law, a court of equity will permit the mortgagee to tack the bond to the mortgage, because otherwise it would create an unnecessary circuitry; for if the heir were allowed to redeem on payment of the mortgage only, the estate would be immediately assets in his hands for payment of the bond. (*s*)

And, since the statute of fraudulent devises, a devisee

(*p*) Bishop v. Sharp, 2 Vern. 471. Archer v. Snatt, 2 Stra. 1107.—

(*q*) Powel v. Glover, 3 P. Wms. Challis v. Casborn, Cha. Prec. 407.  
251. note A. (*s*) Troughton v. Troughton, 1

(*r*) Morret v. Paske, 2 Atk. 53. Ves. 87. 2 Atk. 53. 3 Atk. 630.  
Jones v. Smith, 2 Ves. jun. 376. St. John v. Holford, 1 Cha. Ca. 97.

for his own benefit stands in the same place as the heir at law would have done, and must pay both the mortgage and bond debt, for the statute makes real estates assets in the hands of the devisee for specialty debts. (*t*)

But if the mortgagor devise for payment of debts, the mortgagee cannot tack a bond debt to his mortgage in preference to the rest of the creditors, but must come in *pari passu*; for such a devise is not fraudulent within the statute 3 W. & M. c. 14. (*u*)

So where there are several incumbrances upon an estate of a superior nature to his bond, a mortgagee cannot insist upon his being paid both, which would be a prejudice to the puisne incumbrances: but his bond shall be postponed to all other incumbrancers, whether by mortgage, judgment, or statute staple; for he has not the same equity against a puisne incumbrancer as against an heir at law, who is liable in respect of assets. (*x*)

So, if there are other bond debts, a mortgagee will not be permitted to tack his bond debt to the prejudice of the other bond creditors. (*y*)

So if all the assets be equitable, which is the case where there is a charge or devise for payment of debts, a mortgagee will not be permitted to tack his debt by bond to the prejudice of the simple contract creditors; for equitable assets are administered among the bond creditors and simple contract creditors in average; (*z*) and the principle

Shuttleworth v. Laycock, 1 Vern. 245. S. C. 2 Cha. Ca. 164. Coleman v. Winch, 1 P. Wms. 775. S. C. Cha. Prec. 511. Windham v. Jennings, 2 Cha. Rep. 247.

(*t*) Challis v. Casborn, Cha. Prec. 407. Heams v. Bance, 3 Atk. 630.

(*u*) Heams v. Bance, 3 Atk. 630. Price v. Fastnedge, Amb. 635.

(*x*) Morret v. Paske, 2 Atk. 54.

Powis v. Corbet, 3 Atk. 556.

(*y*) Lowthian v. Hassel, 3 Bro. C. C. 161. Anon. or Jackson v. Langford, 2 Ves. 662. Hartwell v. Chitters, cited 3 Bro. C. C. 163. Hamerton v. Rogers, 1 Ves. jun. 513. 2 Ves. jun. 376.

(*z*) Treat. on Eq. Book IV. part 2. ch. 2. sec. 1.

of the rule, allowing the tacking of a bond as against the heir, is only to prevent a circuitry of actions, and will not be extended further. (a)

So as against a purchaser of the equity of redemption for valuable consideration, from the mortgagor, or his heir at law, a mortgagee shall not be allowed to tack the bond to the mortgage, because the estate in the hands of such purchaser is not liable to the bond debt. (b) And where a mortgagor in his lifetime, or his heir after his decease, conveys the land for the payment of debts, the creditors under the trust deed will be considered as purchasers. (c)

A mortgagee of copyholds will not be allowed to tack a bond or judgment to his mortgage as against an heir coming to redeem, because copyhold lands are not assets, (d) and are not liable to be taken in execution upon a judgment. (e)

If the person, claiming to tack a bond debt and a mortgage together, be beneficially entitled to both debts, it will make no difference whether he claims them both from the mortgagor; or whether he claims one in his own right, and the other as the assignee of the original mortgagee or obligee. (f) And it matters not whether the bond or the mortgage be the debt first incurred. (g)

(a) 3 Bro. C. C. 163. *Anon.* or *Jackson v. Langford*, 2 Ves. 662. *Bond v. Kent*, 2 Vern. 281. *Heams v. Bance*, 3 Atk. 630. *Price v. Fastnedge*, Amb. 635.

(b) *Troughton v. Troughton*, 1 Ves. 87. *Archer v. Snatt*, 2 Stra. 1107. *Gory's case*, 3 Salk. 240. *Bayly v. Robson*, Cha. Prec. 89. *Coleman v. Winch*, 1 P. Wms. 775. S. C. Cha. Prec. 511.

(c) *Anon.* or *Jackson v. Lang-*

*ford*, 2 Ves. 662. *Coleman v. Winch*, 3 P. Wms. 775.

(d) 4 Rep. 22. a.

(e) *Cannon v. Pack*, 6 Vin. 222. pl. 6. S. C. 2 Eq. Ca. Abr. 226. pl. 6.

(f) *Price v. Fastnedge*, Amb. 685. *Blackwell v. Symes*, cited Amb. 686. *Halliley v. Kirtland*, 2 Cha. Rep. 360.

(g) *Windham v. Jennings*, 2 Cha. Rep. 247.

A mortgagee cannot tack a simple contract debt to his mortgage as against the mortgagor. (*h*)

But where a lease is mortgaged, the mortgagee may tack a bond debt, as against the mortgagor seeking a redemption; for the lease is a chattel interest which is liable to debts. (*i*)

So a mortgagee of a lease, or other chattel interest, (*k*) or a pawnee of chattels personal, (*l*) may tack a bond or simple contract debt (*m*) against the executor of the mortgagor.

But the mortgagee of a lease cannot tack a simple contract debt as against a creditor of the mortgagor who brings a bill to redeem, (*n*) or as against a purchaser of the equity of redemption in the mortgaged term. (*o*) So if the executor of the mortgagor assigns over to trustees in trust for the testator's creditors, a mortgagee will not be permitted to tack, for by the assignment the equity of redemption passes over for the benefit of creditors. (*p*)

And where there had been a *decree for creditors to come in*, and afterwards the executrix brought a bill to redeem, and the mortgagee insisted upon tacking, Lord Thurlow seems to have made it a question with the creditors, and not with the executrix simply; stating the principle that where the equity has passed to an assignee, you cannot insist upon retaining against the assignee; and would not allow the mortgagee to tack. (*q*)

(*h*) *Newby v. Cooper*, Finch's Rep. 379.

(*i*) *Halliley v. Kirtland*, 2 Cha. Rep. 360.

(*k*) *Anon.* 2 Vern. 177. *Coleman v. Winch*, 1 P. Wms. 776. S. C. Cha. Prec. 511. 6 Ves. 229.

(*l*) *Demainbray v. Metcalf*, 2 Vern. 690. S. C. *Gilb.* 104. S. C.

Cha. Prec. 419. 2 Ves. jun. 378.

(*m*) 1 P. Wms. 776. *Eccles v.*

*Thawill*, Cha. Prec. 18.

(*n*) 1 P. Wms. 776. 3 Bro. C. C. 23.

(*o*) *Ibid.*

(*p*) *Adams v. Claxton*, 6 Ves. 226.

(*q*) *Vanderzee v. Willis*, 3 Bro.

C. C. 21. 6 Ves. 229.

And in *Demainbray v. Metcalf*, which was the case of a pledge of jewels, and where it was held that the executor of the pawnor must pay the whole, it was admitted that if there had been bond creditors, or if the pawnor had become bankrupt, the pawnee could not have tacked the notes to the pawn so as to have preferred himself to the other creditors. (*r*)

OF TACKING WHERE THE SAME PERSON HAS TWO CLAIMS,  
BOTH MORTGAGES, OR ONE A MORTGAGE AND THE OTHER  
A LIEN UPON LAND.

Where a person has one or more estates mortgaged to him by the same or different instruments, for securing the same or different sums of money, no person claiming under the mortgagor, be he creditor, subsequent incumbrancer, or purchaser, can redeem a part or one only of those estates; but he must redeem them both, and entirely. (*s*) And this rule will be the same, though there be freehold and copyhold mortgaged together, and a bond creditor come to redeem, and it be insisted that as to the copyhold he need not redeem, because they are neither assets, nor liable to an execution. (*t*) So, if personal securities be deposited as a pledge, and afterwards the pawnee take a mortgage of lands for securing a different sum of money, a creditor claiming under the mortgagor, and having a specific lien on the personalty, cannot be admitted to redeem the personal securities without also redeeming the

(*r*) *Gilb.* 104. *S. C.* *Cha. Prec.* *Pierce*, 2 *Vern.* 480. *S. C.* *Cha. Prec.* 237. *Pope v. Onslow*, 2

(*s*) See the cases cited in the three subsequent notes. *Vern.* 286. And see *Aldrich v. Cooper*, 8 *Vcs.* 382.

(*t*) *Acton v. Acton*, or *Acton v.*



mortgaged lands. (*u*) And if two estates be mortgaged to the same person by different instruments for securing different sums, and afterwards the mortgagor mortgage or sell one of those estates to another person; yet such subsequent mortgagee (*x*) or purchaser (*y*) cannot redeem the estate so subsequently mortgaged or sold, without also redeeming the other estate, although at the time of the mortgage or sale he had no notice of the mortgage of the other estate. So if, upon the death of a mortgagor of two estates, the estates become divided, and go in different channels, *viz.* one of them to A. and the other to B., a subsequent mortgagee claiming under A. cannot redeem the part comprized in his mortgage only, but must redeem the entire mortgage. (*z*) And for the same reason neither could A. redeem one estate without the other.

But where a subsequent mortgagee or incumbrancer has redeemed a prior mortgagee, he will have the same right in equity to insist upon an entire redemption, as against any other person coming to redeem him, and may hold the lands till he is repaid all that he gave in discharge of the first mortgagee, as well as all that is due upon his own mortgage. (*a*)

The advantages arising to the mortgagee from this power of tacking two mortgages together is in some instances very considerable; for if a mortgagee has a security insufficient in value to secure his debt, he may af-

(*u*) Jones v. Smith, 2 Ves. jun. 372. Decree there reversed in D. P. See 6 Ves. 229. note.

(*x*) Titley v. Davis, cited Amb. 733. S. C. 2 Eq. Ca. Abr. 604. pl. 35. and 36. S. C. 15 Vin. 447. pl. 19. Tribourg v. Pomfret, Amb. 733. stated. 12 Ves. 59. and see

cases in next note.

(*y*) Ex parte Carter, Amb. 733. Cator v. Charlton, and Collet v. Munden, cited and stated 2 Ves. jun. 377.

(*z*) Palk v. Clinton, 12 Ves. 48.

(*a*) Titley v. Davis, 2 Eq. Ca. Abr. 604. pl. 36.

terwards by obtaining another security more than sufficient cure the defect, and retain till both sums are paid. Which rule of tacking two mortgages together applies with equal force against the mortgagor, (*b*) or his heir, (*c*) coming to redeem, as against any person claiming under them.

So, if the first security be defective in point of title, the mortgagee may tack his two securities together, as against the mortgagor or his heir, claiming by descent. (*d*)

But if one take a mortgage in fee from a tenant for life, he cannot afterwards, by taking an assignment of a mortgage made by the remainder-man, be enabled to tack his two mortgages together, because as to the first mortgage the remainder-man (though he be also heir at law) is a stranger to the tenant for life. (*e*)

In *Jones v. Smith* (*f*) it was said, that a man who happens to be engaged with another in one mortgage only, may redeem, though the other has pledged another estate : but that case, with its circumstances, which it must be allowed are rather special, reversed as it has since been by the House of Lords, seems to be against this position.

If a mortgagee lends more money upon security of the mortgaged lands, without notice of an intervening incumbrance, he may tack the further advance to his original sum, as against the intervening incumbrancer, the mortgagor, and all persons claiming under him. (*g*)

(*b*) *Roe dem. Kay v. Soley*, 2 Blackst. 726. *Pope v. Onslow*, 2 Vern. 286.

(*c*) *Purefoy v. Purefoy*, 1 Vern. 29. *Shuttleworth v. Lacock*, 1 Vern. 245. *Margrave v. Le Hooke*, 2 Vern. 207.

(*d*) *Margrave v. Le Hooke*, 2 Vern. 207.

(*e*) *Bromley v. Hammond*, 2 Cha. Ca. 23. S. C. 1 Eq. Ca. Abr. 326. pl. 12.

(*f*) 2 Ves. jun. 376. Decree there reversed in D. P. see 6 Ves. 229. note.

(*g*) *W. Kely. 6. Goddard v. Complin*, 1 Cha. Ca. 119. *Blackston v. Moreland*, 2 Cha. Ca. 20.

But since the statute of frauds, in order to create a further charge, the agreement for it must be in writing; a memorandum in writing that so much more is due may create a debt by simple contract, but cannot do more. (*h*) So a bond from mortgagor to mortgagee for payment of arrears of interest with interest, though it will not waive the claim of the mortgagee for interest on his mortgage money, yet will not without a special agreement entitle him to tack the compound interest to his mortgage. (*i*)

It need scarcely be noticed that, in order to enable a mortgagee to tack a subsequent advance, it must be made to a person having a right to charge the lands; so that if the mortgagor devise away the estate<sup>1</sup> and die, and the mortgagee, having no notice of the will, advances more money upon credit of the security to the heir at law, he cannot tack his further advance to the original mortgage debt as against the devisee. (*k*)

Where a mortgage deed contains a clause securing not only the sum lent, but future advances, and the mortgagee afterwards lends money upon the faith of this clause, he will have a lien upon the lands for both sums; and he may tack his further advance to his original debt, not only as against the mortgagor, but as against a subsequent mortgagee, though at the time of making the further advance he had notice of the second mortgage, provided the second mortgagee, at the time of his mortgage, had notice of the clause to cover future advances; for it was the folly of the second mortgagee with notice to take such a security. (*l*)

(*h*) 2 Atk. 351. *Ex parte Hooper*,  
1 Mer. 7.; and see *Ex parte Coombe*,  
4 Mad. 249.

(*k*) *Cooper v. Cooper*, Nels. Cha.  
R. 153.

(*l*) *Gordon v. Graham*, 7 Vin.

(*i*) *Hardwick v. Mynd*, 1 Austr. Abr. 52. pl. 3.  
111, 112.

But in every other instance a mortgagee, who has notice of a subsequent incumbrance, cannot tack a further advance to his original debt, as against the subsequent incumbrancer, whether the further advance be made upon the old (*m*) or on a fresh security. (*n*)

If a first mortgagee, without notice of a subsequent mortgage, lends a further sum to the mortgagor, upon a statute or judgment, he shall retain against the mesne mortgagee till both the mortgage and statute or judgment be paid. And the taking of a statute or judgment very much distinguishes his case from that of a first mortgagee advancing money without any agreement in writing that the further advance shall be secured upon the land; for a judgment or statute is an original lien upon the land; and it is to be presumed that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage; and in confidence ventured a further sum on a security, which, though it passed no present interest in the land, yet must be admitted to be a lien thereon. (*o*)

In a case at the Rolls, in 1708, it was declared that if a person that has a first mortgage should, without the consent of the mortgagor, purchase in a subsequent judgment, a mesne mortgagee or assignee of the equity of redemption should not be obliged to pay the money due on both securities, in order to redeem, because such transaction of the mortgagee was only to load the estate without the consent of the owner, when he had no prospect of bettering his own security. (*p*) The law, however, as thus laid

(*m*) *Goddard v. Complin*, 1 Cha. Ca. 119. *Blackston v. Moreland*, 2 Cha. Ca. 20. *W. Kely*. 6.

(*n*) *Cason v. Round*, Cha. Prec. 226.

(*o*) 4th Resol. in *Brace v. Duchess of Marlborough*, 2 P. Wms. 494. *Shepherd v. Titley*, 2 Atk.

352. *Anon.* 2 Ves. 662. The name of which case is *Jackson v. Langford*, see *ante*. 11 Ves. 617. 6 Ves. 229. and note (*b*) there. Ex parte *Knott*, 11 Ves. 617.

(*p*) *Brereton v. Jones*, 1 Eq. Ca. Abr. 326. pl. 11.—See also pl. 10. there.

down, cannot be supposed to be correct at this day; for by the same reason there would be an end of all tacking by a first mortgagee, unless he bought with the mortgagor's consent; whereas we find it laid down by Lord Hardwicke, in very general terms, that where there is a prior mortgagee, who has a puisne incumbrance, a second mortgagee shall not redeem the prior, without redeeming the puisne at the same time; and the reason is, because the legal estate is in the first mortgagee; and equity will not take away that benefit from him, provided he had no notice of the second at the time he bought in the puisne one. (q)

A mortgagee, who has obtained a judgment duly docketed before the execution of a second mortgage, is entitled to tack his judgment to his mortgage, both as against the subsequent mortgagee and the assignees of a bankrupt mortgagor, though at the time of the bankruptcy no execution had issued on the judgment: for though the statute of James puts a judgment creditor, who has not obtained an execution, upon a footing with the general creditors, yet that statute relates only to judgments that continue merely such at the time of the bankruptcy; not to those which have acquired all the effect of an actual mortgage, as is the case of a judgment obtained by a party having an antecedent mortgage. (r)

And in all cases where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of the judgment, but shall be entitled to interest upon the debt secured by judgment, though it exceeds the penalty, down to the time the principal is paid off. (s)

Where a judgment creditor has also a mortgage upon

(q) *Morret v. Paske*, 2 Atk. 52.

and see *Anon.* otherwise, *Jackson v.* 397.

*Langford*, 2 Ves. 662. 2 Ves. 574.

(r) *Baker v. Harris*, 16 Ves.

(s) *Godfrey v. Watson*, 3 Atk. 517.

the estate, without notice of a subsequent judgment, but prior in point of time to his mortgage; if the second judgment creditor goes into equity for a sale of the estate, the first judgment creditor may tack his mortgage to his judgment; for it would be very hard if, with a prior incumbrance in his favour, he should be in a worse condition than a mortgagee, without notice of a prior judgment, who has got in a judgment still prior to that, would be. (t) But the second judgment creditor may, if he prefers it, instead of going into equity, take his remedy at law by extending the estate. (u)

But a mortgagee of copyholds cannot tack a judgment debt to his mortgage, because copyhold lands are not liable to an execution upon a judgment. (x)

If a judgment creditor, or creditor by statute or recognition, buys in the first mortgage, he cannot tack or unite this to his judgment, &c. and thereby gain a preference over a subsequent mortgage, but prior in point of time to his judgment, &c. for one cannot call a judgment, &c. creditor a purchaser, nor has such a creditor any right to the land; he has neither *jus in re* nor *ad rem*; and therefore, though he releases all his right to the land, he may extend it afterwards. Besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the lands afterwards purchased may be extended on the judgment; nor is he deceived or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate. (y)

(t) *Smithson v. Thompson*, 1 226. pl. 6.

*Atk.* 520. *Ex parte Knott*, 11  
*Ves.* 617, 618.

(u) *Smithson v. Thompson*, 1  
*Atk.* 521.

(x) *Cannon v. Pack*, 6 *Vin. Abr.*  
222. pl. 6. *S. C.* 2 *Eq. Ca. Abr.*

(y) 2nd *Resol.* in *Brace v. The*  
*Duchess of Marlborough*, 2 *P.*  
*Wms.* 491. 11 *Ves.* 617. *Anon.*  
otherwise *Jackson v. Longford*,  
2 *Ves.* 862. *Jacob v. Thatcher*,  
14 *Vin. Abr.* 357. pl. 4. and *Mr.*

And it matters not whether the judgment, &c. creditor, at the time of his judgment, &c., had notice of the intervening mortgage or not.

But the case is very different with a mortgagee or purchaser buying in a first mortgage, provided such mortgagee or purchaser had no notice of the intervening mortgage at the time of his mortgage or purchase. For if a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first; yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgagee; and this Lord C. J. Hale called a plank gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*. (z)

If lands be actually extended upon an execution under a statute staple, and the cognizee afterwards lends more money upon his former security, without notice of an intervening incumbrance, he shall hold for both sums against the subsequent incumbrancer, till the penalty of the statute be levied according to the extended value, or by casual profits, such as mines, selling of trees, &c. Because the cognizee, being in possession of the lands, hath both law and equity on his side: but the subsequent incumbrancer has only equity. (a) But beyond the penalty the cognizee

Viner's note in margin. S.C. 1 Cha. Ca. 247. This point was doubted in Wright v. Pilling, Cha. Prec. 494. S. C. Gilb. 150.; and was formerly held otherwise, Turner v. Richmond, 2 Vern. 81.; and Lee and Warner there cited, which seems to be the same case as Hawkins v. Taylor and Leigh, 2 Vern. 29.

(z) 1st Resol. in Brace v. Du\*. of Marlborough, 2 P. Wms. 491.

Marsh v. Lee, 2 Ventr. 337. S. C. 1 Cha. Ca. 162. Cockes v. Sherman, 2 Freem. 13. Belchier v. Renforth, 6 Bro. P. C. 28. Robinson v. Davison, 1 Bro. C. C. 63. Wortley v. Birkhead, 2 Ves. 571. Hawkins v. Taylor, 2 Vern. 29. Turner v. Richmond, 2 Vern. 81.

(a) Hedgeworth, an Inf. by Jackson, v. Primate, Hardr. 318.

has no equity against the subsequent incumbrancer. And therefore, when that is raised according to the extended value, or by casual profits, the subsequent incumbrancer will have a right to enter. And if, at that time, there is any thing due to the cognizee, he will lose his security for the surplus; which reconciles the latter part of *Hedgeworth v. Primate* (b) with the former.

A puisne mortgagee, without notice of intervening incumbrances, who takes in a prior judgment, statute, or recognizance, may tack his mortgage to what he gave for the judgment, &c. and protect himself as against the intervening incumbrancers: but then it will be only *quatenus* the penalty in the judgment, &c. For, as was laid down by Sir Joseph Jekyl, M. R., if a puisne mortgagee, without notice, buys in a prior judgment, or statute, and that judgment, &c. be extended upon an elegit at a value much under the real, (which it invariably is) the mesne mortgagee shall not make the puisne mortgagee, who has got in this judgment, account otherwise, or for more than the extended value; nor will this Court give any relief against the judgment or statute, but leave the mesne mortgagee to get rid of them as well as he can at law. (c) Now at law when the cognizor sues out a *scire facias ad computandum et rehabendum terram*, (and the mesne mortgagee stands in his place,) the account is taken according to the extended value, which is always much below the real: but if he goes into equity for an account, and to have his land back again, the Court will take the account according to the real value, and make the cognizee account for all that he has received above the extended value, which it will only do upon the terms of the defendant or cognizor paying interest on the judgment, and such extra costs as the plaintiff or cognizee was necessarily put to by the cognizor. (d) So that the

(b) *Hard.* 318, cited 2 *Ventr.* of *Marlborough*, 2 P. Wms. 494.  
339., as *Jackson v. Primate*. (d) *Serjt. Williams' note* to 2

(c) 5th *Resol.* in *Brace v. Du'*. *Saunders' Rep.* 72. x. *Marsh v.*



favour which a court of equity allows to a puisne mortgagee, without notice, who has bought in a prior judgment, &c., is, that he shall account according to the extended value, and not according to the real value, unless he has received sufficient to satisfy both his judgment and mortgage. (e) But when the puisne mortgagee has received so much of the profits as would, according to the extended value, satisfy the penalty of the statute, the same may be avoided, either by a *scire facias ad computandum*, or by an account to be taken in Chancery. (f)

Hence it follows that a judgment, or a recognizance in the nature of a judgment, taken in by a puisne mortgagee, cannot protect more than one moiety of the land ; for as a judgment creditor by *elegit* can extend but a moiety, so it will protect but a moiety in the hands of his assignees. (g) But if the first incumbrance be a statute staple, a statute merchant, or a recognizance in the nature of a statute, which affect all the lands of the cognizor, (h) a subsequent mortgagee, having bought it in, would be protected as to the whole lands, until the penalty was satisfied according to the extended value. (i) So if the subsequent mortgagee without notice were to get in two judgments, as of the same term antecedent to the mesne mortgage, and were to take out two *elegits*, he would be protected as to the whole lands, because under one judgment he might have execution of one moiety, and under the other judgment he might have execution of the other moiety. (k) But then it is absolutely ne-

Lee, 2 Ventr. 338. Earl of Bath v. Earl of Bradford, 2 Ves. 589, 590. Audley v. —, Hard. 136.

(e) Huntington v. Greenville, 1 Vern. 52. Marsh v. Lee, 2 Ventr. 338. S. C. 1 Cha. Ca. 162. Hard. 318, 319. Windham v. Richardson, 2 Cha. Ca. 212.

(f) Huntington v. Greenville, 1 Vern. 52. Hedworth v. Primate,

Hard. 318. 2 P. Wms. 493. Windham v. Richardson, 2 Cha. Ca. 212.

(g) Higgon v. Syddal, 2 P. Wms. 493., cited and stated. S. C. 1 Cha. Ca. 149.

(h) 3 Co. 12. a. 7 Co. 37. b. 38. a.

(i) 2 P. Wms. 493. Hedworth v. Primate, Hard. 318.

(k) Gilb. Exec. 55, 56. 16 Ves. 427.

cessary that both the judgments should be as of the same term. For otherwise, under the *elegit* upon the first judgment, he would be entitled to one moiety of the lands in execution; and under the *elegit* upon the second judgment he would be entitled to one moiety of the remaining moiety. (*l*)

The reason why a mortgagee may tack his mortgage to a judgment is this, because, the judgment creditor, by virtue of an *elegit*, may bring an ejection, and hold upon the extended value; and, as he has the legal estate, the Court will not take it from him. (*m*)

And here we may note a diversity where a third mortgagee buys in a statute, which is the first incumbrance, and where a statute creditor, &c. being the third incumbrancer, buys in the first mortgage; in the latter case the statute or judgment creditor, because he did not lend his money on the credit of the land, shall not unite the first mortgage to his statute or judgment: but in the former, as the land was in the view and contemplation of the lender, he shall be allowed to unite the statute to his third mortgage. (*n*)

But though a judgment creditor cannot, by taking in a prior mortgage, enable himself to tack his judgment to what he gave for the mortgage, as against mesne mortgagees; yet it does not follow that a mortgage taken in by a judgment creditor can in no way assist him. For if it carry with it the legal estate, it will, at any rate, preserve his priority as against a subsequent mortgagee, without notice of his judgment, who might otherwise, by getting it in, acquire a priority over the judgment creditor. (*o*)

(*l*) Attorney-General *v.* Andrew,  
Hard. 23. 27. 2nd point. Huit *v.*  
Cogan, Cro. Eliz. 482. Gilb. Exec.  
55, 56. See the form of the writ,  
Lilly's Entries 576. Tidd's Forms  
453.

(*m*) Morret *v.* Paske, 2 Atk.  
53.

(*n*) 2 P. Wms. 493. 11 Ves.  
617., and cases cited ante, 288,  
note (*o*).

(*o*) Bristol *v.* Hungerford, 2  
Vern. 524. S. C. 1 Eq. Ca. Abr.  
152. pl. 5. Turner *v.* Richmond, 2  
Vern. 81.

Yet, in order to enable a prior mortgagee to tack a subsequent judgment to his mortgage, it is necessary that the cognizor should have been seized of the land at the time of confessing the judgment. For if A. mortgage to B., and then convey away the equity of redemption to C., and afterwards confess a judgment to D., B. cannot take an assignment of this judgment, and tack it to his mortgage, because the equity of redemption, being out of A., at the time of the judgment, the subsequent judgment could never be a lien on the estate. (*p*)

So if a mortgagor devises his estates for payment of debts and dies, and the mortgagee, after his death, sues his executor on the bond, and obtains judgment, the mortgagee cannot tack this judgment to his mortgage to the prejudice of the other creditors of the mortgagor, whether by specialty or simple contract; and this, for three reasons, first, because the mortgagor, by having devised his estates for payment of debts, has made them equitable assets which are administered amongst the creditors by specialty and simple contract equally; (*q*) secondly, because it has been decided that under such circumstances a mortgagee cannot tack a bond debt to the prejudice of the other creditors; (*r*) and, thirdly, which is a consequence of the last, that, if he cannot tack a bond debt, he cannot alter the case by obtaining a judgment on his bond. But in this case, if the executor pay the judgment debt out of the personalty, a Court of equity will not make the mortgagee refund. (*s*)

(*p*) *Breerton v. Jones*, 1 Eq. Ca. Abr. 325. pl. 10. *Stephenson v. Hayward*, Cha. Prec. 310.

(*q*) 3 and 4 W. and M. c. 14. *Deg v. Deg*, 2 P. Wms. 416.; and cases cited by Mr. Cox, in note 2. there. *Bath v. Bradford*, 2 Ves. 590. *Lingard v. Derby*, 1 Bro. C. C. 311. *Hughes v. Doulben*, 2 Bro. C. C.

614. *Sharpe v. Scarborough*, 4 Ves. 538.; and see ante, pa. 186., as to administration of equitable assets.

(*r*) *Heams v. Bance*, 3 Atk. 630. *Price v. Fastnedge*, Amb. 685.

(*s*) *Wilson v. Fielding*, 10 Mod. 426.

But a subsequent mortgagee may tack, though the mortgagor, at the time of making such subsequent mortgage, had nothing to mortgage. As if one mortgage to A., and then convey the equity of redemption absolutely to B., and after that mortgage the same lands to C., who has no notice of the sale to B., C. may take in the mortgage to A., which will entitle him to hold against B. till both mortgages are paid. (*t*)

The protection afforded by a court of equity to a puisne mortgagee, without notice, who has taken in a precedent judgment statute or recognizance, will not be varied by such judgment, &c. having been previously satisfied, provided they can be made use of at law. (*u*) Nor does it matter whether the puisne mortgagee took in the judgment previous to his mortgage, or after. (*x*) So a prior incumbrance will protect a subsequent mortgagee in equity, although no consideration were paid for it; (*y*) or if the consideration be by way of exchange. (*z*) And if a mortgagee has taken in a satisfied statute, the mesne incumbrancer cannot, by taking out letters of administration to the cognizee, and procuring the statute to be vacated, deprive the mortgagee of the benefit of it; but he will be put in the same plight as if the statute were never vacated. (*a*)

In order to enable a mortgagee to tack two mortgages together, it is necessary that he should have them both in

(*t*) 2 Collect. Jurid. 241. 248, 249.; and see *Oxwith v. Plummer*, Gilb. 13. S. C. 2 Vern. 636.

(*u*) *Edmunds v. Povey*, 1 Vern. 187. *Stanton v. Sadler*, 2 Vern. 30. *Wymonsel v. Hawland*, cited 2 Vern. 159. *Anon.* 2 Cha. Ca. 208. *Hacket v. Wakefield*, Hard. 172. *videtur contra.* Sed vide *Higgon v. Syddal*, 1 Cha. Ca. 149.

(*x*) *Huntington v. Greenville*, 1 Vern. 52.

(*y*) *Holt v. Mill*, 2 Vern. 279. S. C. 1 Eq. Ca. Abr. 323. pl. 3. *Culpeper's case*, cited 2 Freem. 124.

(*z*) *Churchill v. Grove*, 1 Cha. Ca. 35. Nels. 89.

(*a*) *Huntington v. Greenville*, 1 Vern. 49.

the same right. For if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person; or, if a third mortgage come to him as executor, he shall not be allowed to tack the two mortgages together to the prejudice of intervening incumbrancers; for, if this were permitted, a mere stranger purchasing the third mortgage, by declaring he bought in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrances. (*b*)

And so it is with respect to a judgment: a mortgagee cannot tack them together, where the mortgage and judgment are held in different rights. (*c*)

We have already noticed that a third mortgagee, without notice of an intervening mortgage, by taking in a first mortgage or judgment, will be protected against the mesne mortgagee: but the rule is by no means confined to the taking in of one incumbrance only. For if a fifth mortgagee, without notice of a fourth mortgage, were to take in the three preceding mortgages, he might hold as against the fourth mortgagee till the three first as well as the fifth mortgage were paid off. (*d*) So if there were a mortgage, a judgment, a mortgage, and then another mortgage, if the last mortgagee took in the first mortgage and judgment, he might hold against the second mortgagee till the first mortgage, the judgment, and also his own mortgage, were paid off. (*e*)

If a man borrow money on a note of hand, and express in the note that it shall be secured by mortgage on his estate, and the note-holder finding that he had before mortgaged his estate, take in a prior mortgage, he may tack his

(*b*) *Morret v. Paske*, 2 Atk. 53. by's note.

*Barnett v. Weston*, 12 Ves. 130.

(*d*) *Cockes v. Sherman*, 2 Freem.

(*c*) *Morret v. Paske*, 2 Atk. 53. 13.

*Mrs. Symonds' demand in Bristol v. Hungerford*, 2 Vern. 525. Raith-

(*e*) *Marsh v. Lee*, 2 Ventr. 337. S. C. 1 Cha. Ca. 162.

note to the first mortgage; for there is nothing in this case to vary it from the case of a first, second, and third mortgage, where the last mortgagee, after having notice of the second mortgage, takes in the first. (*f*)

If the first mortgage comprize only a part of the land contained in the third mortgage, it will protect but that part. As if a man seized of sixty acres mortgages twenty to A., and then the whole to B., and afterwards mortgages the whole to C., and C. purchases in the first mortgage, that shall not protect more than the twenty acres: but it shall protect those twenty acres, so as B. shall never recover that until he pay C. all the money upon the first and last mortgage. (*g*)

But if the first mortgage comprizes more than the third, but not more than the second mortgage, the third mortgagee may hold all the lands in the first mortgage till he is satisfied both his securities. (*h*)

Whence it follows that if a man seized of the manors of A. and B. acknowledges a statute, and then mortgages both manors to C., and afterwards only one of them to D., and D. takes in the statute, he may hold both manors against C. till he is satisfied both the statute and the money due upon his own mortgage; (*i*) unless, indeed, as has been before observed, the penalty of the statute shall have been previously satisfied.

A prior mortgage can be no protection to a subsequent mortgagee as against a mesne mortgagee, until the condition be forfeited; for, till then, the estate remains liable to defeated at law by performance of the condition. (*k*)

(*f*) *Matthews v. Cartwright*, 2 Cha. Ca. 212. *Marsh v. Lee*, 2 Atk. 347. Vent. 337. 339. S. C. 1 Cha. Ca.

(*g*) *Marsh v. Lee*, 2 Vent. 339. 162. 166. 168. *Videtur contra.*

(*h*) *Bovey v. Skipwith*, 1 Cha. Ca. 201. (*k*) *Hitchcock v. Sedgwick*, 2 Vern. 160. 2 Ves. jun. 376.

(*i*) *Windham v. Richardson*, 2

A subsequent mortgagee, without notice at the time of advancing his money of a prior mortgage, may also protect himself against the prior mortgagee, and acquire a priority over him by taking in an outstanding term for years created prior to either of the mortgages, and attendant upon the inheritance, whether by express agreement or by construction of equity. For the equity between the two mortgagees is equal; and the subsequent mortgagee, having also the law on his side, shall have a priority in payment over the first mortgagee. (*l*) And for the same reason an outstanding term for years taken in by a mortgagee, will protect him, and give him a preference over all other charges and incumbrances brought upon the estate between the creation of the term and his mortgage. But an outstanding term can never be a protection against any charge or incumbrance of which the mortgagee had notice at the time of advancing his money.

It is also a rule in equity, in settling the priority of incumbrances, that that incumbrancer shall, in payment, be preferred who has the best right to call for the assignment of an outstanding term. And therefore, where there was a question which should be preferred, a first mortgagee, who had the first declaration of the trust of the term, or a second mortgagee, who had a subsequent declaration of the trust, but had the custody of the deed, Lord Northington held that a declaration of trust, in favour of an incumbrancer, was tantamount to an actual assignment, unless a subsequent incumbrancer *bonâ fide*, and without notice, procured an assignment. And the custody of the deeds respecting the term, with a declaration of the trust of it, in favour of a second incumbrancer, was equivalent to an actual assignment; and, therefore, gave him an advantage over the first incumbrancer, which equity would not take

(*l*) Willoughby v. Willoughby, Morgan, 1 Term Rep. 755. 6 Ves. 1 Term Rep. 763. Goodtitle v. 184, 185. 10 Ves. 260.

from him. (*m*) So if a mortgagee has the deed creating the term in his possession, it will give him a priority over the former incumbrancers. (*n*) And as to all subsequent incumbrancers, it is very clear that if he has all the deeds relating to the term in his hands, no use can be made of it against him. Where a mortgagee makes the trustees of a term parties to his conveyance, it is considered tantamount to a declaration of trust in his favour, and will protect him against mesne incumbrances: (*o*) but nothing short of an actual assignment will protect a mortgagee against the mortgagor's wife's right of dower. (*p*)

Thus we see that a mortgagee may gain a priority over mesne incumbrances, either by taking an assignment of the term, making the trustee of the term a party to the instrument, or taking possession of the deed creating the term. (*q*) And that, as between two incumbrancers, a mortgagee with an actual assignment, or with a declaration of trust in his favour, and the custody of the deed creating the term, shall be preferred to a mortgagee who has only a declaration of trust. (*r*)

It has sometimes been argued that if a subsequent incumbrancer were to take an actual assignment of a term, he would be protected against one who had only got possession of the deed creating it: but Lord Eldon has decidedly expressed his opinion against this distinction; and his opinion is conformable to Lord Hardwicke's, and seemingly to Lord Northampton's also. (*s*) His lordship

(*m*) *Stanhope v. Earl Verney*,  
Butler's Co. Lit. 290. *b.* note 1.  
sec. 13. S. C. 2 Eden. 81.

(*n*) *Maundrell v. Maundrell*, 10  
Ves. 260. 271. Ex parte Knott,  
11 Ves. 612, 613. 1 Term Rep.  
762.

(*o*) *Wilkes v. Bodington*, 2 Vern.  
599. 10 Ves. 270.

(*p*) *Maundrell v. Maundrell*, 7  
Ves. 567. 10 Ves. 246.

(*q*) 10 Ves. 271.

(*r*) *Stanhope v. Earl Verney*,  
But. Co. Lit. 290. *b.* note (1.) s.  
13. S. C. 2 Eden. 81.

(*s*) See *Stanhope v. Earl Verney*,  
But. Co. Lit. 290. *b.* note (1.) s.  
13. S. C. 2 Eden. 81.



put it upon this ground, that if a purchaser has got the original title deed to the term, the Court cannot be satisfied that there is any truth in the assertion, that the legal estate is in the person, who the adversary says has it. (*t*) And Lord Hardwicke thought, that as you cannot in many cases trace the representative, if the purchaser uses so much diligence as to take possession of the deed, a court of equity ought not to compel him to produce that deed to his prejudice. (*u*) But Mr. Powell has given it as his opinion, that if a case should arise, in which the non-possession of the title deeds, and amongst others of the deed creating the term and the deed assigning it, can be accounted for in a satisfactory manner, either by such purchaser having had a probable cause assigned him, from whence he may presume that there were no title deeds belonging to the estate, or of an incumbrancer taking his estate from one who has no right to the title deeds, and who, therefore, would not give them up, as a mortgagee of a reversion, (the title deeds in such case belonging to the tenant for life,) that, in such case, the possession of the title deeds, though comprizing among them both the deed creating and the deed assigning the term, would not be a good defence against a *prior* purchaser or incumbrancer for a valuable consideration, without notice, who should get an actual assignment of such term from the person in whom the legal estate therein should be vested. (*x*)

(*t*) *Ex parte Knott*, 11 Ves. 609. 612, 613.

(*u*) *Ex parte Knott*, 11 Ves. 613. *Willoughby v. Willoughby*, 1 Ter. Rep. 763. 772. But under circumstances it seems that a mortgagee, having the legal estate, would be preferred to one having the custody

of the deeds only. See the inferences drawn from *Plumb v. Fluit*, *post*.

(*x*) 1 Pow. on Mort. 510, 4th edition. And see *Tourle v. Rand*, and the cases cited, *post*. under possession of title deeds.

From the case of *Willoughby v. Willoughby*, before Lord Hardwicke, (y) we may conclude that, in order to entitle a mortgagee to the benefit of a legal term got in by him, there should at least be three requisites. 1st, He must be a mortgagee for a valuable consideration. 2dly, He must not have had notice of the prior charge or incumbrance against which he seeks to be protected at the time of advancing his money. And, 3dly, He must have taken his mortgage *bona fide*, without any intention of gaining an unfair advantage over a prior incumbrance or estate, of which he has notice. For if a mortgagee, with notice of a jointure, annuity, and portions, charged upon an estate, should take a mortgage to himself absolutely, with a covenant that the estate was free from incumbrances, except an old term assigned to a trustee for him, and the mesne assignments thereof, thereby plainly intending to conceal that full notice which he had of the jointure, annuity, and portions, (which would appear by his not admitting notice, but putting the plaintiff upon the proof of it,) in such a case, the mortgagee would lose the benefit of the term, as against the jointress, not only as to the jointure annuity, but as to a previous mortgage made to her, and would be postponed to the jointure, the portions, and the jointress's mortgage. For the jointress, as claiming an estate of which the mortgagee had notice, has a better or preferable right to call for an assignment of the outstanding term for years than the mortgagee; or she might by injunction prevent the trustee from recovering in ejectment against her. And when that was done, she might protect her mortgage by it by compelling the mortgagee to redeem her in respect of the arrears of her annuity; and then he must redeem her entirely. (z) But

(y) 1 Term Rep. 763. *Butler's Co. loughby*, in Chancery, reported 1 Lit. 290. *b. note* (1.) s. 13. Term Rep. 763. S. C. Ambler 282.

(z) See *Willoughby v. Will-* S. C. 1 Collect. Jurid. 337.

I conceive that the *mala fides* of the mortgagee, as to an incumbrance of which he has notice, is not sufficient to take from him the benefit of a term got in by him in favour of another prior incumbrancer of whose estate he had no notice, unless such prior incumbrancer has a better right to call for an assignment of the term as by having custody of the deed creating it. (a) The case of *Willoughby v. Willoughby*, however, it should be observed, would have been decided in favour of the jointress upon her equitable right to call for an assignment of the term in preference to the mortgagee, independent of the circumstance of *mala fides* in the mortgagee. For Lord Hardwicke had decided the question upon that ground, and makes use of the *mala fides* of the mortgagee as a circumstance in corroboration only of his opinion against him. (b)

But in a late case before the present Lord Chief Baron Richards, at Gray's Inn Hall, (c) it was held that a covenant to stand possessed for one, to secure him a certain sum of money, was not tantamount to an assignment of the term, so as to enable him to tack a subsequent advance as against a mesne mortgagee. In that case A. having a term vested in him to secure a sum of money for B., upon an advance by C. of 2900*l.*, agreed with C. to stand possessed of the term to secure him his 2900*l.*, and interest. Afterwards a mortgage was made of the same lands to D., who, at the time of his mortgage, had notice of the mortgage to C. Then C. took a second mortgage of the estate for a further sum of money. And it was held, that the effect of A.'s covenant with C. was only to make A. a trustee for C. to the extent of the 2900*l.*, and interest, and did not give C. a right to call for a conveyance of the legal

(a) As to this point see *Ex parte Knott*, 11 Ves. 612, 613. and ante. (c) *Frere v. Moore*, and others, Gray's Inn Hall, 8th July, 1820. MS.  
(b) 1 Term Rep. 773, 774, 775.

estate, so as to enable him to tack his second mortgage to his first to the prejudice of D.'s mortgage. But that the two mortgages to C. and the mortgage to D. must be paid according to their priorities. And it was further held that there was no laches in D. for not having notice given of his mortgage to C., when his (D.'s) mortgage was made.

It has not yet been determined what is the precise situation of a trustee who has an outstanding satisfied term for years vested in him, and assigns it over to a subsequent mortgagee. From some saving expressions in *Willoughby v. Willoughby*, it cannot be conceived that Lord Hardwicke meant to determine that the trustee, aware of the prior incumbrance, would be safe in making the assignment to a subsequent incumbrancer, any more than a trustee to preserve contingent remainders joining to destroy them. At the same time he thought that the purchaser or subsequent incumbrancer, provided he had no notice of the prior incumbrance at the time of his purchase, would be safe in taking the assignment if he could get it. (d) Upon this it has been observed, that if the purchaser would be safe, the trustee ought to be so too. (e) But there is no incongruity in Lord Hardwicke's opinion ; for his lordship does not say that a purchaser can in every instance make use of the term : but he makes *the time at which* the purchaser or subsequent mortgagee had notice of the former incumbrance to form the criterion whether he shall be able to make use of the term or not, putting it just upon the same footing as the case of a trustee to preserve contingent remainders. " If such a trustee join in a conveyance to a purchaser for a valuable consideration, and the purchaser has notice of that trust, the latter is affected with the trust, and shall be decreed to reconvey

(d) 1 Term Rep. 770, 771.

11 Ves. 613, 614. at the top of the

(e) Per Lord Chancellor Eldon, page.

the estate to the old uses. But if the purchaser comes in *bonâ fide*, and has no notice, he shall retain the estate : but the trustee shall make satisfaction for his breach of trust in destroying the contingent remainder. It is just the same here, if the puisne purchaser or mortgagee *has notice*" (which must be intended at the time of his purchase or mortgage,) "of the prior purchase or incumbrance. He shall not avail himself of the assignment of the term : but shall be decreed to reconvey, or procure it to be reconveyed. If he has *no notice*, he must retain it : but if the trustee, who joined in the assignment, had notice of such prior purchase or incumbrance, his conscience was affected by the trust ; it was a breach of trust in him ; and he ought to be decreed to make satisfaction. This," said his lordship, "in my opinion, is what equity would demand." (f) In a case *Ex parte Knott* (g) Lord Eldon, alluding to the case of a trustee, with notice of a prior incumbrance, assigning to a subsequent purchaser or mortgagee, observed, that he had not made up his mind that the Court would not restrain the trustees from permitting their names to be used by such subsequent purchaser or mortgagee. And, in a still later case, (h) his lordship said, "Is there any case where a third mortgagee has excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second ? When the case of *Maundrell v. Maundrell* (i) was before me, I looked for, but could not find, such a case ; that, where there was bad faith on the part of the first mortgagee, that equity was applied." To which Sir Samuel Romilly replied, that he "did not believe that was ever decided ; and there would be great difficulty in deciding it in favour of the third mortgagee,

(f) 1 Term Rep. 771. See the Reporter's note, 15 Ves. 336. and *Charlton v. Low*, 3 P. Wms. 330.

(h) *Mackreth v. Symmons*, 15 Ves. 335. 10 Ves. 260, 261.

(i) 10 Ves. 246.

(g) 11 Ves. 613.

who puts himself in the place of the first." These expressions, however, go far enough to shew that a prior mortgagee or trustee, with notice of an intervening or prior incumbrance at the time of assigning his term, puts himself in a very hazardous situation; and that at present it is doubtful whether this notice to the first mortgagee or trustee is not sufficient to affect the conscience of the third mortgagee so as to prevent him from making use of the term.

But if a trustee of a term has in any manner given an incumbrancer a better right to call for a conveyance, as by making himself a party to his conveyance, the Court will prevent a subsequent purchaser from getting an assignment. (*k*) And by consequence, if a subsequent mortgagee at the time of taking in a term, or legal estate, has notice of its being vested in the assignor upon express trusts, he cannot protect himself as against the *cestuis que trust*, claiming under these trusts, though he advanced his money originally *bonâ fide*, and without notice. (*l*)

But a term taken in by a subsequent mortgagee cannot enable him to alter the order of the incumbrances from what they originally stood so as to acquire a priority in payment, or entitle him to tack his own mortgage debt to that which he has bought in as against the mesne incumbrancers, unless it carries with it the legal estate. (*m*) Therefore, if a mortgage be made to A., and afterwards the same lands be mortgaged to B., and then a third mortgage be made to A., but the legal estate is outstanding in C., A. must first be paid his first mortgage, then the mortgage to B. must be paid, and after that the second mort-

(*k*) Wilks v. Bodington, 2 Vern. Rep. 769. 771. Ithell v. Beane, 1 Ves. 215.

(*l*) Sanders v. Deligne, 2 Freem. 123. S. C. 2 Vern. 271. Willoughby v. Willoughby, 1 Term

(*m*) Clarke v. Abbott, Barnard. Cha. Rep. 462, 463.

gage to A. (n) For it is a rule in equity, that in all cases, where the legal estate is standing out, the several incumbrances must be paid according to their priority: *qui prior est in tempore, potior est jure*; which goes upon this principle, that the first in point of time has the best right to call for a conveyance of the legal estate. (o)

But this is a question which does not depend upon time only; for, as we have already seen, a subsequent equitable incumbrancer may in some cases have a better right to a conveyance of the legal estate, than a prior incumbrancer, as if he has possession of the deed creating the legal term, &c. (p) So where a subsequent mortgagee agreed to buy in a statute, but it was not assigned to him upon a bill brought by mesne mortgagees to be let in on payment of what was due on the statute, and to have it assigned to them, and insisting that the subsequent mortgagee could not tack because he had not law and equity on his side, for the statute was not assigned to him, the Lord Chancellor was strongly of opinion against the plaintiffs. (q)

In *Nairn v. Prowse*, (r) it was made a question whether a mortgage by deposit of title deeds should be preferred to the equitable claim of a vendor for purchase money unpaid. Romilly, who argued for the mortgagee, compared it to the case of 1st, 2nd and 3rd mortgagee, where the mortgagee who had the best right to call for a conveyance

(n) *Frere v. Moore and Others*, before Chief Baron Richards, Gray's Inn Hall, July 8, 1820. MS.

(o) *Willoughby v. Willoughby*, 1 Term Rep. 773, 774. S. C. Amb. 282. 7th Resol. in *Brace v. Duchess of Marlborough*, 2 P. Wms. 495. *Clarke v. Abbot*, Barnard. 455.—*Ex parte Knott*, 11 Ves. 618.—*Becket v. Cordley*, 1 Bro. C. C. 353.

(p) *Maundrell v. Maundrell*, 10 Ves. 260. 271. *Ex parte Knott*, 11 Ves. 612, 613. *Wilkes v. Bodington*, 2 Vern. 599. 10 Ves. 270. *Stanhope v. Earl Verney*, Butl. Co. Lit. 290. b. note (1.) s. 13. S. C. 2 Eden. 81. and see *supra*, p. 300.

(q) *Wyndham v. Richardson*, 2 Cha. Ca. 213.

(r) 6 Ves. 752.

of the legal estate would be preferred; and argued that the possession of the deeds gave him this right over the vendor. But it being held that the vendor, by having taken a special security for the purchase money, had waived his equitable lien, the point was not decided.

Amongst equitable incumbrances, mortgages are not preferred to others, which are liens upon land; but mortgages, judgments, statutes, and recognizances, all take place according to priority, and as they stand in order of time. (s)

But if a man agree to mortgage his estate, and afterwards conveys away the land, or devises upon trust for general creditors, the claim of the mortgagee will be preferred to that of the general creditors; for the general creditors cannot stand in any other way than the person from whom they claimed at the time the act was done in their favour. And if there are any judgments subsequent to the contract to mortgage, a court of equity will controul the effect of those judgments in favour of the mortgagee. (t) In like manner, and upon the same principle, in cases of bankruptcy, where there has been a mortgage by deposit, the claim of the general creditors, or assignees, has been universally postponed to that of the mortgagee. (u)

And the rule is the same where one mortgages by a defective conveyance, and then becomes bankrupt. As where one surrendered copyhold by way of mortgage, which surrender was void for want of timely presentment, and then became bankrupt, the creditors under the commission were postponed to the mortgagee; for such defective surrender operated at least as an agreement to mortgage as against

(s) *Bristol v. Hungerford*, 2 and Lef. 381.

Vern. 525. *Symmes v. Symonds*,  
1 Bro. P. C. 66.

(t) Sir Simeon Stuart's case, cited  
and stated 3 Ves. 574. 582. 2 Scho.

(u) *Pye v. Daubuz*, 2 Dick. 759.  
S. C. 3 Bro. C. C. 595. And see  
the other cases cited in Chap. I.  
in treating of equitable mortgages.



the bankrupt; and the creditors claiming under him stand in his place, and come under the same obligation in conscience, to make good the defective security. (x)

So if a man mortgages by a defective conveyance, as a feoffment void for want of livery, and there are subsequent creditors, whose debts did not originally affect the land, equity will supply such defective conveyance against such subsequent incumbrancers who acquired a legal title afterwards; for since the subsequent creditors did not originally take the land for their security, nor had in view an intention to affect them, when afterwards the lands are affected, (which would be the case of creditors by simple contract or bond, obtaining judgments,) and they come in under the very person that is obliged in conscience to make the defective security good, they stand in his place, and shall be postponed to such defective conveyance. (y)

But if A. makes a defective mortgage to B., and A. continues in possession, and afterwards gives a bond to C. with warrant of attorney to confess judgment, and C. enters judgment immediately; there it should seem that the bond, warrant, and judgment, are to be looked upon as one act, and that C. had the land originally in view for his security; and there B. cannot have relief against C. upon the defective conveyance, in a court of equity. (z)

But if a man mortgages lands by a defective conveyance, and afterwards mortgages to a second person by an assurance that is good and effectual, without notice, the second shall prevail, because that carries the legal title; and equity will not interpose when both are equally upon

(x) *Taylor v. Wheeler*, 2 Vern. Nels. 183. *Gilb. For. Rom.* 228, 564. S. C. 1 P. Wms. 280. S. C. 229, 230.  
2 Salk. 449.

(z) *Gilb. For. Rom.* 230. And

(y) 1 Eq. Ca. Abr. 320. pl. 1. see *Cockes v. Sherman*, 2 Freem. 14, 15.  
*Burgh v. Francis*, Rep. temp. Finch, 28. S. C. 5 Bac. Abr. 41. S. C.

a valuable consideration. (a) Yet in this case, if the second purchaser or mortgagee had notice at the time of his purchase or mortgage of the prior defective mortgage, his conscience will be bound by it, and he will be decreed to make it good. (b) So if the second purchaser or mortgagee be only a volunteer, he must make good the prior defective security. (c)

If by marriage settlement an estate be limited to the husband for life, and then to trustees for five hundred years, to raise younger children's portions, with a power to the husband to charge the premises with a sum of money, subject to his life estate; and he afterwards executes his power in favour of a mortgagee; the claim of the mortgagee will be preferred to that of the younger children, for his estate comes in after the life estate of the settlor, to which only the power is subject. (d) But in this case it seems that if the estate were insufficient to answer both charges, it would give room for a very material question. (e) At any rate it suggests the propriety of specifying with the greatest nicety all the charges to which it is intended that a power to charge shall be subject.

A recognizance, which is enrolled by order of the Court after the time elapsed for the enrolment, (f) takes effect only from the time that it is actually enrolled; and will, therefore, be postponed to all judgments obtained between

(a) *Oxwith v. Plummer*, Gilb. 13. S. C. imperfectly reported. 2 Vern. 636. 1 Eq. Ca. Abr. 320. pl. 1. 5 Bac. Abr. 43. *Martin v. Seamore*, 1 Cha. Ca. 170. Gilb. For. Rom. 228.

(b) *Jennings v. Moore*, 2 Vern. 609.

(c) *Martin v. Seamore*, 1 Cha.

Ca. 170.

(d) *Mosley v. Mosley*, 5 Ves. 249.

(e) 5 Ves. 259.

(f) For the proper time for enrolling recognizances see 1 P. Wms. 340. Mr. Cox refers to *Ld. Clarendon's Orders* 148. 27 Eliz. c. 4. s. 7.

the date of the recognizance and the enrolment. (g) And as to purchasers or mortgagees; the statute 29 Car. II. c. 3. s. 18. enacts that no recognizance shall bind any lands or tenements in the hands of any purchaser *bonâ fide*, and for valuable consideration, but from the time of the enrolment.

The same statute of the 29 Car. II. c. 3. s. 15. enacts, that judgments as against purchasers *bonâ fide* for valuable consideration of lands to be charged thereby, shall, in consideration of law, be judgments only from the time that they shall be actually signed, and shall not relate to the first day of the term whereof they are entered. Now the statute of the 4 and 5 William and Mary c. 20. provides that no judgment shall be of any force to affect lands or tenements in the hands of purchasers or mortgagees, unless alphabetically doggetted, and entered as therein mentioned. Therefore, where a judgment was signed in June, 1725, a mortgage made in 1728, and in 1730 the judgment was docketed, which was after the time appointed by the statute of the 4 and 5 William and Mary, it was held that the mortgagee had got the preference of the judgment by defect of the docket. (h) In the same case it was said, by the Master of the Rolls, that notice or not notice was not material: but it has since been determined that if a purchaser at the time of his purchase has notice of a judgment, he will be bound, and must take the lands subject to such judgment, though not properly docketed. (i)

(g) *Fothergill v. Kendrick*, 2 App. No. 18. Vern. 234. And see *Bothomley v. Fairfax*, 1 P. Wms. 334. S. C. 2 Vern. 751.

(h) *Forshall v. Coles*, 7 Vin. 54. pl. 6. S. C. 2 Eq. Ca. Abr. 592. pl. 8. S. C. Sugd. on Vend. and Pur.

(i) *Davis v. Earl of Strathmore*, 16 Ves. 419. As to the manner of docketing judgments; that they are ineffectual if docketed after the time, which must now be understood of a case in which the pur-

The statute of frauds, however, concerns only purchasers, and not creditors. And, therefore, if one enters judgment in vacation, when, indeed, the party is dead; yet, if he was living in the precedent term, the judgment is good by relation, and will take effect from the first day of the preceding term, and thus give the judgment creditor a precedence over the other creditors, (*k*) as indeed it would have done at common law previous to the statute of frauds, even in the case of a subsequent purchaser.

So the statute of W. and M., as to judgments not docketed, is confined to cases where they are set up against purchasers or mortgagees, or heirs, executors or administrators, in the administration of the effects of those of whom they are respectively representatives. Wherefore, where a judgment was not docketed according to the statute of the 4 and 5 W. and M., and the Master, in settling priorities, had postponed it to subsequent judgments on that account, upon an exception taken to this report by the first judgment creditor, the Court allowed it, and ordered him to stand in priority according to the signing of his judgment. (*l*)

If there be a satisfied judgment, and then a mortgage, a simple contract creditor cannot by any agreement made between himself and the cognizor, after the mortgage, that the judgment shall stand as a security for his debt, gain a precedence over the mortgagee; for, when the judgment was once satisfied and kept on foot, it was in

chaser or mortgagee has no notice, and that a judgment will bind if docketed within the time, though after the mortgage or purchase. See *Sale v. Crompton*, 1 Wils. 61. S. C. 2 Stra. 1209. *Forshall v. Coles*, *ubi supra*. *Hodges v. Templar*, 6 Mod. 191; and *Sugd. on*

*Vend. and Pur.* 561. 4th edit.

(*k*) *Robinson v. Tonge*, 3P.Wms. 399. *Hodges v. Templar*, 6 Mod. 191.

(*l*) *Robinson v. Harrington*, Hil. Term, 1778. MS. S. C. 2 Pow. on *Mortg.* 518. 4th edit.

trust for the cognizor ; and when money is advanced afterwards, and no mention of this judgment at the time of the lending, this declaration afterwards shall not keep it on foot to defeat a purchaser : but if so be that the creditor had lent his money at first upon the prospect and security of this judgment, perhaps it might have been otherwise. (*m*)

(*m*) *Cockes v. Sherman*, 2 Freem. 14, 15.

## CHAPTER VIII.

## OF THE POSSESSION OF CHATTELS PERSONAL.

IN this and the two following Chapters we shall proceed to consider some of the means whereby the power of tacking and the priority of incumbrances, of which we have been speaking in our last, may be affected: wherein—1st, Of the possession of chattels personal. 2nd, Of the possession of title deeds. 3rd, Of the registration of deeds relating to property lying in the register counties. 4th, Of fraud in a prior incumbrancer. And, 5th, Of notice.

## OF THE POSSESSION OF CHATTELS PERSONAL.

Chattels personal, by our law, are *primâ facie* considered the absolute property of him in whose possession they are to be found; consequently, if the mortgagee of a chattel personal does not take possession of the subject of the mortgage, but allows the mortgagor to retain the possession of it, he enables the mortgagor to hold out to the world that he is the owner of it in his own right, absolutely and unincumbered. The possession, therefore, of the mortgagor is in this case considered fraudulent.

And, as such, it will fall within the statute of the 13 Eliz. c. 5., which statute enacts, that all conveyances of

lands, tenements, hereditaments, goods or chattels, or any charge or profit thereout, and every bond, suit, judgment, and execution, made with an intent to defraud creditors, shall, as against the persons so defrauded, be absolutely null and void. The 7th section of the same statute provides that the act shall not extend to avoid any estate or interest in lands, tenements, &c., goods or chattels, which estate or interest shall be upon good consideration and *bonâ fide* lawfully conveyed or assured, provided the person to whom they are conveyed or assured, at the time of the conveyance or assurance, had no manner of notice of such covin, fraud, or collusion, as is aforesaid.

About thirty years after the passing of this statute occurred Twyne's case ; (a) the circumstances of which were shortly these ;—A., indebted to Twyne in 400*l.* and to C. in 200*l.* pending an action brought by C. for recovery of his debt, assigned over all his chattels, which were of the value of 300*l.*, to Twyne, in satisfaction of his debt ; and the gift was held fraudulent on the statute of the 13th of Eliz. One of the signs of fraud being held to have been, as stated by Lord Coke, that the donor continued in possession and used the goods as his own ; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

And if a mortgagor, continuing in the possession of a chattel personal, become bankrupt, the subject of the mortgage will become the property of the assignees for the benefit of the general creditors. For the statute of the 21 Jac. I. c. 19. s. 11. expressly enacts, that if any person shall at the time of his bankruptcy have in his possession any goods or chattels whereof he shall be reputed owner, with the consent of the true owner or proprietary, the commissioners may sell the same for the

(a) 3 Co. 80 b.

benefit of the creditors, as any other part of the bankrupt's estate. And it has been held that a mortgagee is a true owner or proprietary under this statute. (*b*)

But all questions upon the statute of the 21 Jac. have much more of fact than of law in them ; for if it can be once ascertained whether the bankrupt was the reputed owner or not, there can be very little difficulty in deciding. From that reputed ownership false credit arises ; from that false credit arises the mischief ; and to that mischief the remedy of the statute applies. (*c*)

So it seems that all questions arising under the statute of the 13th Eliz. have much more of fact than of law in them ; and that the previous question, in all cases under this statute, may be the same as under the 21st Jac. For if it can be ascertained that the mortgagor acted as reputed owner, and thereby deceived others, his possession cannot but have been fraudulent ; as was held in Twyne's case.

Referring the reader, therefore, to those cases generally, where the possession of the mortgagor, assignor, or bankrupt, has been held fraudulent under one or other of these two statutes, (*d*) we proceed rather to the consideration of those cases wherein the possession of the mortgagor has been decided not to be fraudulent.

And here it will be necessary to premise, that the pos-

(*b*) *Bryson v. Wylie*, 1 Bos. and Pul. 83. note. *Ryall v. Rolle*, 1 Atk. 164. *Stevens v. Sole*, 1 Ves. 352. 1 Atk. 157. 180. *Lingham v. Biggs*, 1 Bos. and Pul. 82.

(*c*) Per Buller, J. *Lingham v. Biggs*, 1 Bos. and Pul. 89. *Walker v. Burnell*, Doug. 320.

(*d*) *Twyne's case*, 3 Co. 80 b. *Stevens v. Sole*, 1 Ves. 352. 1 Atk. 157. 180. *Ryall v. Rolle*, 1 Ves.

349. S. C. 1 Atk. 165. *Mace v. Cadell*, Cowp. 232. *Lingham v. Biggs*, 1 Bos. and Pul. 82. *Bryson v. Wylie*, 1 Bos. and Pul. 83. note. *Gordon v. East India Company*, 7 Term Rep. 228. *Horn v. Baker*, 9 East, 215. *Reed v. Blades*, 5 Taunt. 212. *Longman v. Tripp*, 2 New Rep. 67. and see *Parker v. Patrick*, 5 Term Rep. 175.



session of a chattel personal, after having parted with the interest, is only *primâ facie* evidence of fraud. And, however familiar it may be to say that it proves fraud, yet such saying amounts to no more than this, *viz.* that it is *primâ facie* evidence of property in the man possessing until a title, not fraudulent, is shewn under which that possession has followed. Every case from *Twyne's* case (*e*) downwards supports this ; and there was no occasion otherwise for the statute of King James. Per Eldon Chancellor. (*f*) This observation and the express words of the statute of 21 Jac. go, I think, to support this, *viz.* that, in order to bring a case under either of these two statutes, there must be, not only a fraudulent continuance of possession by the mortgagor, but a fraudulent leaving of the possession in the mortgagor by the mortgagee.

But there is a distinction between the two statutes, *viz.* that under the 21 of Jac. it shall be called a fraudulent leaving of possession in the mortgagor by the mortgagee, unless the transfer of the property be notorious : but that under the 13 of Eliz. the mere circumstance of a want of notoriety of transfer is not sufficient to constitute it a fraudulent leaving of possession in the mortgagor by the mortgagee. Hence it follows, that the statute of the 13 of Eliz. is more confined in its operation than that of the 21 of James. And that a case which falls within the 13 of Eliz. must *a fortiori* fall within the 21 of James ; but that a case may very easily arise which would not be considered fraudulent under the 13 of Elizabeth, but would still be held to be within the 21 of James. (*g*)

To the statute 21 Jac. there are many exceptions, as in

(*e*) 3 Co. 80 b.

(*f*) *Lady Arundell v. Phipps*,  
10 Ves. 145. *Bull. Ni. Pri.* 258.

(*g*) For this see *Bucknall v.*  
*Roiston*, *Cha. Prec.* 287. 10 Ves.

145. 3 Taunt. 258. lines 11 and

12. *Reed v. Blades*, 5 Taunt. 216.

*Kidd v. Rawlinson*, 2 Bos. and Pul.

59. And see post. 319.

the case of factors, bankers, lodgers, and others, who are known to have the goods of other persons in their possession, none of which, it is true, are expressly excepted in the statute ; yet the ground of all the exceptions has been, that the possession of such and such descriptions of persons did not carry to the understanding of the world the reputed ownership. The same rule might extend to furniture let with a house ; and, perhaps, even to furniture let without the house, to be used there where such lettings were usual ; and, by a parity of reason, to utensils of trade usually let to the traders ; because possession in such cases would not carry the reputed ownership of the property, and would not impose on the world a false appearance of property in the possessor. (*h*) For though the possession of goods exposed to sale in a shop may be within the statute, yet the possession of furniture in a house is no more evidence of a right to that furniture than of a right to the house. (*i*)

So the possession of a carpenter who receives wood to make it into a waggon, or of a tailor to whom cloth is sent for the purpose of being worked up, is very different from that of a person making sale of any part of his property, and yet continuing in possession and taking upon himself the disposition of it, with the consent of the vendee. For the wood or cloth comes into the possession of the carpenter or tailor in the natural course of the transaction, in which there is no fraud, either actual or constructive. Wherefore, if the carpenter or tailor become bankrupt, the true owner will not lose his property. (*k*) As where a mortgagee of a lease had entered, and used some timber furnished to the mortgagor by the plaintiff for building,

(*h*) *Horn v. Baker*, 9 East, 215.  
245. Cowp. 233. *Collins v. Forbes*,  
3 Term Rep. 316. *Copeman v. Gal-*  
lant, 1 P. Wms. 314.

(*i*) *Walker v. Burnell*, Doug.  
320.  
(*k*) *Collins v. Forbes*, 3 Term  
Rep. 316. 323.

and it appeared that the mortgagor had committed an act of bankruptcy previous to the mortgage, the mortgagee was held liable for so much of the timber as had been used by his order. (*l*)

So if it be notorious that the person in possession has absolutely parted with the ownership of goods, and that he retains possession only according to the contract between him and the vendee, his possession will not come under the statute of the 21 of King James. (*m*)

Again, it has been frequently decided that if one becomes insolvent, and his goods are publicly sold by the sheriff under an execution, and the purchaser permits the insolvent to continue in possession of the goods, the possession of the insolvent is not fraudulent under the 13 of Elizabeth. (*n*) And the same has been held where the purchaser bought by appraisement. (*o*) But in either of these cases, if the original proprietor were to become bankrupt, the statute of the 21 Jac. 1. c. 19. would vest the property in the assignees of the possessor. (*p*)

If the insolvent has been for a long time in possession, has during that period acted as visible owner, if no money was given for the purchase by the person permitting the insolvent to continue in possession, nor any rent paid by the insolvent for his occupation; or, if the person purchasing cannot prove any execution or judgment, under which he claims these in deed; are facts to be determined by a jury, and are sufficient to bring a case within the statute of the 13 Eliz. or the 21 of James. (*q*)

(*l*) Williams v. Shaw, 1 Espi. 93.

(*m*) Muller v. Moss, 1 Maule and Selw. 335. Leonard v. Baker, 1 Maule and Selw. 251.

(*n*) Kidd v. Rawlinson, 2 Bos. and Pul. 59. S. C. 3 Espi. 52. 10 Ves. 145. Watkins v. Birch, 4

Taunt. 823. Reed v. Blades, 5 Taunt. 216.; and see Bucknal v. Roiston, Cha. Prec. 287.

(*o*) Dawson v. Wood, 3 Taunt. 256.

(*p*) See the cases cited in the two last notes.

(*q*) Reed v. Blades, 5 Taunt. 212.

Goods, which are incapable of an actual delivery, will pass by a symbolical delivery. And, therefore, where A. having contracted with a canal company to build locks and bridges on the canal, as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises on the banks of the canal; and on the company's advancing money to him they took a bill of sale of these goods, and a symbolical delivery of them by a half-penny; afterwards the company took out execution upon a judgment confessed by A., and the sheriff seized these goods, and A. became a bankrupt. And it was held that A. had not such a possession of the goods as would enable his assignees to take them within the 21 Jac. I. c. 19. s. 11., for the best delivery was given that the nature of the goods would admit of, they being before on the company's premises. And it was also held that this bill of sale was no act of bankruptcy in A. (*q*)

So if goods are in a warehouse, the delivery of the key of the warehouse has been held sufficient to take the case out of the statute of James: for in bulky goods this is all that can be done. (*r*)

So if a ship at sea be mortgaged, and the requisites of the statutes requiring registry (*s*) are complied with, and the grand bill of sale delivered over to the mortgagee; this will be considered a sufficient possession in the mortgagee to take the case out of the statute of Elizabeth, or James, if the mortgagor should become bankrupt; and this, although it be stipulated that the mortgagor should continue in possession till default in payment of the mortgage money on demand. For if it were otherwise, it would greatly tend to hinder the mortgages of ships, whereas they, being for the benefit of trade, ought to be encouraged. But, as

(*q*) *Manton v. Moore*, 7 Term Rep. 67. and see *Smith v. Smith*, 2 Stra. 955.

(*s*) 26 Geo. 3. c. 60. 34 Geo. 3.

(*r*) 7 Term Rep. 71. 1 Ves. 244.; c. 68. s. 15, 16.

from the nature of it no actual delivery can be made at the time of the mortgage, a delivery of the grand bill of sale has always been held sufficient to transfer the property. (*t*)

But then it is absolutely necessary that the mortgagee should take possession of the ship immediately upon its arrival in harbour; otherwise it will go to the assignees of the bankrupt mortgagor. (*u*) And the requisites of the ship-register acts having been complied with will not vary the case. (*x*)

Moreover if the mortgagor should become bankrupt between the time of assigning the ship and before the time of complying with the ship-registry acts, the property will pass to the assignees. (*y*)

But then this will only be so in the case of gross delay on the part of the mortgagee; for, if the requisites of the statutes be complied with within a reasonable time after the assignment of the ship, the intermediate bankruptcy of the mortgagor will not affect the title of the mortgagee; (*z*) which seems to reconcile the doubts suggested by Eldon, Chancellor, (*a*) and Baron Wood, (*b*) on the propriety of the decision in *Moss v. Charnock*.

(*t*) *Atkinson v. Maling*, 2 Term Rep. 462. *Ex parte Matthews*, 2 Ves. 272. *Bourne v. Dodson*, 1 Atk. 154.

(*u*) *Brown v. Heathcote*, 1 Atk. 160. *Ex parte Matthews*, *ubi supra*. *Atkinson v. Maling*, *ubi supra*. *Ex parte Batson*, 3 Bro. C. C. 362. *Falkener v. Case*, 2 Term Rep. 491. S. C. 1 Bro. C. C. 125.

(*x*) *Mair v. Glennie*, 4 Mau. & Sel. 240. *Hay v. Fairbairn*, 2 Barn. and Ald. 193. S. C. 1 Holt

603. *Robinson v. M'Donnel*, Selw. N. P. 1142. S. C. 2 Barn. and Ald. 195.

(*y*) *Moss v. Charnock*, 2 East. 399.

(*z*) *Palmer v. Moxon*, 2 Mau. & Sel. 43. *Dixon v. Ewart*, 3 Mer. 322. 332.; and see *Thompson v. Smith*, 1 Mad. 395.

(*a*) *Mestaer v. Gillespie*, 11 Ves. 637.

(*b*) *Hubbard v. Johnstone*, 3 Taunt. 208.

If the vessel be in port at the time of the mortgage, the mortgagee must immediately take possession. (c)

Upon the same footing as the assignment of the ship itself stands the assignment of a cargo or goods in a ship at sea; for, if there be a mortgage of the cargo or goods in a vessel at sea, and the bills of lading and policies of insurance are delivered over to the mortgagee, and the mortgagor, before the ship returns, becomes bankrupt, the claim of the assignees will be postponed to that of the mortgagee, for the mortgagee has the best possession the circumstances of the case will admit. (d)

And whether there be an express assignment of the bill of lading, or there be only an agreement to assign, that can make no difference, as neither conveys more than the equitable title. As was determined where there was an agreement to assign and a delivery over of letters of advice, and policies of insurance, and the bills of lading were assigned over on their arrival, but the mortgagor had become bankrupt in the mean time. In which instance we are to observe there could be no inconvenience, nor inlet to fraud; for no other person can be taken in to lend money on the cargo, after the party has delivered over all the documents to him who has the first lien. (e)

Yet, as a mortgagee of a ship at sea must take possession of the ship immediately upon its arrival in harbour, so ought a mortgagee of a cargo or goods on board a ship at sea to take possession immediately upon their arrival.

If the consignee of bills of lading assigns them over by way of mortgage, the consignor cannot afterwards stop them in *transitu*; for although, as between the consignor and consignee, the actual ownership is not altered until

(c) Hall v. Gurney, 1 Cooke's 160. S. C. 2 Term Rep. 491.  
B. L. 333. Stephens v. Sole, 1 Ves.  
352. S. C. 1 Atk. 157.

(e) Lempriere v. Pasley, 2 Term  
Rep. 485.

(d) Brown v. Heathcote, 1 Atk.

delivery of the goods, so that the consignor may stop them in *transitu* to the consignee, in case of his insolvency, not having paid for them; yet, as between the consignor and an assignee of the consignee for valuable consideration, *bonâ fide* and without notice of the non-payment, the right of the consignor to stop in *transitu* is devested. (*f*)

But a factor cannot pledge goods consigned to him to sell; and, if he does, the mortgagee or pawnee cannot retain them, as against the principal, although he had no notice that the person with whom he dealt was a factor only, and although the bill of lading do not designate that the consignee should fill the character of factor only. (*g*) But if the pawnee be the broker, authorized by the factor to sell, and the money were advanced for any purposes connected with the sale, and for which brokers in the ordinary course of disposing of goods are accustomed to advance it, the pawnee or broker would have a lien in respect of such advance. (*h*) Or, if the factor, by the assent of his principal, exhibited himself to the world as owner, and by that means obtained credit as owner, the principal would be liable who furnished the means. (*i*)

It was decided, once, that if a factor pawns goods, though to one without notice, and the pawnee will not admit that they were the goods of the principal, the Court of Chancery will order the pawnee to let the principal look at them, that he may be thereby enabled to maintain an action at law. (*k*) But where a tenant for life had pawned

(*f*) *Lickbarrow v. Mason*, 2 Rep. 604. *Newsom v. Thornton*, Term Rep. 63. 1 H. Black. 357. 6 East. 17. *Martini v. Coles*, 1 2 H. Black. 211. 5 Term Rep. 367. Mau. and Selw. 140. and cases there cited.

683. Approved of by Lord Kenyon (*h*) 1 Mau. and Selw. 147.

in *Salomons v. Nissen*, 2 Term Rep. 674. (*i*) *De Leira v. Edwards*, 1 Mau. and Selw. 147.

(*g*) *Paterson v. Tash*, 2 Stra. 1178. (*k*) *Marsden v. Fanshall*, 1 Vern. 407. *Daubigny v. Duval*, 5 Ter.

plate, upon a bill for discovery brought by the trustees, Lord Thurlow thought that a plea of lending *bonâ fide*, and without notice, was sufficient, saying “that he could not see any room to distinguish it from the case of a discovery sought for of the title of the purchaser; but the same rule must apply, namely, that a purchaser without notice, and for a valuable consideration, is not bound, in conscience, to assist the right owner in the legal recovery of the subject purchased under such circumstances.” In the principal case, however, the plea being insufficient on another point, he over-ruled it. (*l*) Upon which the trustees brought their action at law, and recovered the plate. (*m*)

A broker cannot pledge the goods of his principal; and, if he does, the pawnee, claiming under such tortious act of the broker, cannot retain them against the principal for the lien which the broker has on the goods for the general balance due to him at the time of the pledge. But this is confined to the case of a broker undertaking to pledge the goods of his principal as his own; and does not extend to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him, in which case he might preserve the lien. (*n*)

A bailee of goods, having them in his possession for safe custody, cannot pawn them: but the bailor may recover them from the pawnee, though at the time of the pawn he had no notice of his ownership. (*o*)

The possession of a holder of a bill of exchange is very different from that of a factor for the purpose of render-

(*l*) Hoare v. Parker, 1 Bro. C. C. Rep. 376.

578. See also Earl of Macclesfield v. Davis, 3 Ves. and Bea. 16.

(*n*) M'Combie v. Davies, 7 East.

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(*m*) Hoare v. Parker, 2 Term

(*o*) Hartop v. Hoare, 3 Atk. 44.



ing bills of exchange negotiable. The right of property in them passes with the bills, and the property and possession are ever inseparable ; so that if an indorsee of a bill of exchange deposit it with A., to receive when due, and A. deposit it with B. as a security, and become bankrupt, the indorsee cannot recover it from B. (*p*)

But a person, who has title deeds lodged with him for a particular purpose, cannot raise money upon them by way of mortgage by depositing them over : but the mortgagee or pawnee will be decreed to deliver them up to the right owner, for it was his own fault to take possession of the deeds without inquiring into the title. (*q*)

An agent or attorney, having a power to sell, assign, and transfer stock in the public funds, cannot transfer it under the power by way of mortgage : but, if he does, the mortgagee will be decreed to retransfer it to repay the dividends he may have received, and to pay the costs of the suit. But it would be otherwise if the mortgagee had no notice of the power ; and this it seems it would be very easy for the agent or attorney to effect, by first selling the stock into another name, and then buying it back in his own. (*r*)

But, to return to what shall be considered a sufficient taking possession of chattels personal. Where A. and B., merchants at Liverpool, wishing to draw on C. and D., bankers and merchants in London, agreed to consign to them as a collateral security hemp and iron to the amount of 10,000*l*. on sale for their account, and afterwards sent to them the invoice and bill of lading indorsed in blank, but the ship was prevented from leaving Liverpool by an embargo, and while the ship was lying at Liverpool A. and B. became bankrupts ; it was held that the goods be-

(*p*) *Collins v. Martin*, 1 Bos. bottom, 1 Mar. 414. S. C. 6 Taunt. and Pul. 648. 12. S. C. 4 Camp. 121.

(*q*) *Jackson v. Butler*, 2 Atk. (*r*) *De Bouchout v. Goldsmid*, 306. See also *Hooper v. Rams-* 5 Ves. 211.

longed to C. and D., and not to the assignees in bankruptcy of A. and B.; for the moment the goods were put on board, and the bill of lading was indorsed and remitted to C. and D., the property was changed, and was to remain in their hands clothed with the trust expressed in the agreement. (s)

And, indeed, so decisive is the evidence of ownership, which the possession of the bill of lading carries with it, that if a mortgagee of a cargo should actually take possession of the cargo, but leave the bill of lading with the mortgagor, a *bonâ fide* indorsee of the bill of lading, though subsequent to the mortgage, might oust the title of the mortgagee. (t)

The opinion of the judges in *Lucas v. Dorrien* (u) is very strong to shew that goods lying in the warehouses of the West India Dock Company will pass by the indorsement and delivery over of the dock checks or warrants: but clearly so if the indorsee or holder of the warrants gives notice of the transfer to the Dock Company before the bankruptcy of the vendor. As was held by Lord Ellenborough, that the mere giving notice to the wharfinger, without any actual transfer in his books, or any other thing done thereon, was effective to complete the transfer of property. (v)

If there be an absolute bill of sale of goods to a mortgagee, it is considered fraudulent and void, unless possession *accompanies and follows* the deed, which in this case must be taken immediately upon the execution of the bill of sale: (w) but if the conveyance or bill of sale be con-

(s) *Haille v. Smith*, 1 Bos. and Pul. 563.

(t) *Nathans v. Giles*, 5 Taunt. 558. 564. 574, 575. S. C. 1 Mar. 226.

(u) 7 Taunt. 278. S. C. 1 Moo.

29. *Zwinger v. Samuda*, 1 Moo. 12.

(v) *Harman v. Anderson*, 2 Camp. 243. 7 Taunt. 289. *Hammond v. Anderson*, 1 New Rep. 69. *Jones v. Dwyer*, 15 East. 21.

(w) *Bamford v. Baron*, 2 Term

ditional, there the mortgagor's continuing in possession does not avoid it. (x) Which distinction we find recognized by Lord Ellenborough in *Muller v. Moss*, above cited, where the vendor continued in possession; his lordship there saying, that it was a part of the contract that the bankrupt should remain in possession during the three months; but that it might have been a very different thing, if the bankrupt had retained the possession without its being a part of the contract. And it further appears from *Kidd v. Rawlinson*, and *Cadogan v. Kennet*, above cited, in which the conveyance was held to be not fraudulent, though possession was not delivered at the time, because the want of immediate possession was at least consistent with, and followed the deed, according to the contract entered into between the parties. But if the bill of sale be absolute, and the mortgagee does not take possession till after the death of the mortgagor, he will be considered an executor de son tort, and will be liable to be charged as such. (y)

But in order to oust the mortgagee's right to the goods on account of the possession of the mortgagor, and to bring the case within the statute of the 13 Eliz. c. 5. or the 21 of Jac. 1. c. 19., it is necessary that the mortgagee should be a consenting party to the fraudulent possession of the mortgagor. For if a question arose on the case of a mortgage of goods, or an absolute sale, and the vendor did not deliver them at the time appointed; but on trover against him kept the vendee at arm's length, and in the mean time became bankrupt; this would not be considered as a leaving of the goods by the vendee in possession of

Rep. 594. note. Ibid. 594, 595,  
596. *Stone v. Grubham*, 2 Bulstr.  
217.

(x) *Edwards v. Harben*, 2 Term  
Rep. 587. *Bucknell v. Roiston*,

Cha. Prec. 287. *Steward v. Solme*,  
1 Bro. and Bing. 506. *Stone v.*  
*Grubham*, 2 Bulstr. 217.

(y) *Edward v. Harben*, 2 Term  
Rep. 587.

the bankrupt within the act, the vendee having done every thing in his power to get possession from him. So upon a mortgage of goods contracted for, and agreed to be delivered into the party's hands, or the key of the warehouse (which in bulky goods is all that can be done) but no such delivery is made ; and a bankruptcy follows ; detainee having been brought for them, they would not be considered as having been left in the possession of the bankrupt ; the pursuit in a court of justice excluding any actual or presumed consent. (z)

Where a farmer gave a bill of sale of all his farming stock to secure a debt, and the agent of the vendee took possession, and resided on the farm while he converted the stock ; but the vendor also continued to reside on the farm, and exercised acts of ownership over parts of the stock : it was held that the debt being *bonâ fide* due, and the bill of sale taken with a view to recover that debt, the jury were warranted in finding the bill of sale good against a judgment creditor who had taken the stock under an execution. And though it was alleged that there was sufficient stock left to satisfy the debt after having satisfied the judgment, yet this circumstance was not allowed to avail the judgment creditor on account of the fluctuating value of the property at the time of the bill of sale. (a) :

If one partner mortgage his share of the stock in trade to another, the mortgagee must take the sole possession of the entirety, though as partners they were originally possessed *per mie et per tout* ; for if the mortgagee permit the mortgagor to continue as half owner of the stock in trade, and the mortgagor become bankrupt, his possession will be considered to fall within the statute of the 21st of James. (b)

(z) *West v. Skip*, 1 Ves. 244.

*v. Smith*, 1 Camp. 333, contra.

(a) *Benton v. Thornhill*, 2 Marsh.

(b) *Ryall v. Rolle*, 1 Atk. 165.

427. S. C. 7 Taunt. 149. *Jezeph*

S. C. 1 Ves. 348.

*v. Ingram*, 1 Moo. 189. *Wordall*

And, *a fortiori*, if a partner mortgage a share of his interest in the partnership stock in trade to a stranger, and continue in possession, and become bankrupt, the stranger cannot claim any of the property mortgaged, or any share of the profits arising from the trade in respect of the mortgaged property, but only as a general creditor. (c)

It has very frequently been decided that plate, china, furniture, &c. which are settled to go as heir looms, (d) or are settled for the benefit of children, (e) cannot be taken in execution under the 13 Eliz. c. 5. for a debt contracted by the tenant for life; though in these cases, as to the world in general, he appears the ostensible owner, and that because the settlement was made with no view to defraud others.

So where a widow, administratrix of her former husband upon her second marriage, agreed that some plate should be at her own disposal, and died leaving it to her children, Lord Hardwicke held that the children were entitled to the plate in preference to the assignees in bankruptcy of the second husband, because the bankrupt had not the plate in his own right. (f)

Upon the same principle in *Lockyer v. Savage*, (g) where 4000*l.*, the lady's fortune, was, by settlement previous to marriage, vested in trustees for the husband during his life, with a direction that, if he failed in the world, the trustees should not pay the produce of it to him, but apply it to the separate maintenance of his wife and children, it was held that the provision for the wife's main-

(c) *Ryall v. Rolle*, 1 Atk. 165.  
S. C. 1 Ves. 348.

(d) *Cadogan v. Kennett*, Cowp. 432. *Foley v. Burnell*, Cowp. 435. in note. *Earl of Macclesfield v. Davis*, 3 Ves. and Bea. 16.

(e) *Jarman v. Woolloton*, 3 Ter.

Rep. 618. *Haselington v. Gill*, 2 Term Rep. 597. S. C. 3 Term Rep. 620. note. *Lady Arundell v. Phipps*, 10 Ves. 139.

(f) *Ex parte Marsh*, 1 Atk. 158.

(g) 2 Stra. 947.

tenance was good against the creditors, as it was not a provision out of the bankrupt's estate, but a settlement of her own fortune. Conditions of which sort have since become very frequent, and are always supported: (*h*) but the law is always taken with the distinction laid down in *Lockyer v. Savage*, that a stipulation of this sort cannot be sustained in a settlement of the husband's property. (*i*)

The statute of James does not apply to chattels real, or to fixtures annexed to the realty; but only to chattels personal and moveable. And, therefore, if there be a mortgage of a lease, fixtures, and furniture, and the mortgagor continue in possession and become bankrupt, the mortgage will still remain valid as to the lease and fixtures, though the furniture will vest in the assignees: (*k*)

Where one mortgaged lands and a windmill standing upon part of the land, and continued in possession, a creditor of the mortgagor's took the mill in execution, whereupon the mortgagee brought his action. And at the trial on the assizes before Dallas, C. J. two questions were made: 1st, Whether the windmill was affixed to the freehold, or a mere chattel; and, 2dly, If a chattel, whether the property in it passed to the mortgagee, he never having taken corporal possession. The jury found that the windmill was not a fixture: but gave a verdict for the plaintiff; which verdict the defendant obtained leave to move to set aside. And the matter coming on in the Common Pleas, the Court avoided entering into the question whether fixture or no fixture: but held that the mortgagee was not

(*h*) *Ex parte Cooke*, 8 Ves. 353. *Hinton, Ex parte*, 14 Ves. 598. *Matter of Meagham*, a bankrupt, 1 Scho. and Lef. 179. *Higginson v. Kelly*, 1 Ball. and Beat. 252.

(*i*) See the cases cited in the two last notes. See also *Butler's*

note to *Fearne's Cont. Rem.* 249, 250. 6th edition.

(*k*) *Ex parte Quincey*, 1 Atk. 477. *Reed v. Blades*, 5 Taunt. 212. *Horn v. Baker*, 9 East. 215. 1 Brod. and Bing. 512, 513.

obliged to take possession ; and refused to set aside the verdict on account of the peculiar nature of the chattel which could not pass from hand to hand ; Richardson, J. saying, that though, in the estimation of the jury, this was considered a chattel, yet it is *quodam modo* annexed to the land, and very distinguishable from that species of goods of which the property usually accompanies the possession. (l)

Debts and choses in action are within the statute of James. The consequence is that if they remain in the possession, order, and disposition, of the bankrupt, at the time of the bankruptcy, they will pass by the assignment to the assignees. Therefore, in order completely to divest the bankrupt of such debts, he must have done every thing that is equivalent to a delivery of chattels personal, that is, of moveable goods: and the judges, at least one, Sir Thomas Parker, says, that which is equivalent to delivery of moveable is, in the case of a debt, an assignment and delivery of the security, if any, and notice to the debtor of the assignment. Thus, if a bond is assigned, the bond must be delivered, and notice must be given to the debtor: but in assignments of book debts notice alone is sufficient, because there can be no delivery ; and as to bills of exchange or promissory notes they are assignable at law. It might, perhaps, have been a question, whether, after assignment and delivery of the security to the assignee, the bankrupt could be said to have the order and disposition, merely because there was no notice to the debtor of the assignment. Probably that requisite was added ; as otherwise the debtor might safely pay the money to the person who had, without his knowledge, ceased to be his creditor. The debtor would be *bonâ fide* in making the payment ; and it would be impossible to make him pay again. Sir Thomas Parker lays it down certainly that there must be that notice. (m)

(l) *Steward v. Lolme*, 1 Bro. & Bing. 506.

(m) *Jones v. Gibbons*, 9 Ves. 410. *Ryall v. Rolle*, 1 Atk. 177.

But, however this may be, it is certain that if a mortgagee of lands, on a forfeited mortgage, assign his mortgage, and become bankrupt, the mortgage debt will not vest in his assignees under the commission, though the assignee of the mortgage has neglected to give notice of the assignment to the mortgagor. For the land is the principal, and he who has the land has in effect the debt; and the law will be the same, though there be a bond or covenant to accompany the mortgage, and the assignee neglect to give notice. (n)

Stock in the public funds, where it is so situated as to be incapable of an actual transfer, will pass by an assignment by deed. And, therefore, where one had invested 3000*l.* three per cents. in the joint names of himself and the Drapers' Company, to secure to them the payment of the rent on a lease of certain premises granted to him by the Drapers' Company, and agreed to assign it over as a security, and became bankrupt; Lord Eldon held that the 21 of Jac. I. c. 19. did not vacate the second security; for the bank would not take notice of an agreement to transfer. And the bankrupt having only an equitable interest, and no power to make an actual transfer, his equitable interest passed by the agreement, without his legal interest, which he could not part with. (o)

And, as between different persons claiming equitable liens on stock, the same rule holds good in payment, of preferring him who is the first in point of time that has been established between incumbrancers on real property; and a second *bonâ fide* incumbrancer of stock obtaining an actual transfer may, in like manner, postpone a prior incumbrancer of the equity only. Thus, where Lady Shuldham, upon the marriage of her son, agreed by deed-poll that certain monies due to her upon mortgage should im-

S. C. 1 Ves. 367. *Ex parte Ruffin*,  
6 Ves. 128.

(o) *Ex parte Kensington*, 2 Ves.  
& Bea. 79. 2 Term Rep. 490, 491.

(n) *Jones v. Gibbons*, 9 Ves. 407.



mediately upon her decease become the property of her son; after which the mortgage money was paid off by instalments, and invested in Exchequer bills, and subsequently in the three per cents.; and then she assigned the stock, bought with the Exchequer bills, and also other stock, to her bankers as a security, but no transfer was ever made to the bankers. Sir W. Grant held, that the representative of the son was entitled to so much of the stock as was proved to have been purchased with the produce of the mortgage money, for that the deed-poll gave the son an equitable interest, which would stand good against any person taking by assignment: but as he had only an equitable title, it would not have availed him against a *bonâ fide* transfer for a valuable consideration. (p)

But in all cases of a mortgage of an equitable interest in stock, or of a chose in action (which applies also to the assignment of a mortgage) the mortgagee should give notice of his mortgage to the trustee, or to the person liable to pay, that he may be bound by the equity of the mortgage. And the same precaution should be observed with respect to a trustee of a term for years, when a mortgagee leaves a legal estate outstanding. In which case, if the trustee should afterwards assign to a subsequent mortgagee, he would be answerable to the first mortgagee for a breach of trust, as appears from the case of *Willoughby v. Willoughby*, above cited. And this notice should be given in the presence of a witness, and in writing; a copy of which the witness should keep. Which copy may be given in evidence. (q)

If the mortgage be made by assignment of a debt, the mere act of assignment does not entitle the mortgagee to maintain an action for it. The debtor may refuse his as-

(p) *Liebman v. Harcourt*, 2 Mer. 513. 2 Term Rep. 490.

(q) *Surtees v. Hubbard*, 4 Espi. 203.

sent; he may have an account against the assignor, and wish to have his set off: but if there is any thing like an assent on the part of the holder of the money, in that case, it seems that the mortgagee or assignee may maintain *assumpsit* for it, which is an equitable action. (r) But the mortgagee may sue in the name of his principal or mortgagor, if the mortgage deed gives him a power of attorney to get in the debt. Or he may recover it in a court of equity, though there be no such power. But a power of attorney from the mortgagor for the mortgagee to sue, and recover the debt in the name of the mortgagor, ought never to be omitted in preparing a mortgage of a chose in action.

(r) *Surtees v. Hubbard*, 4 Espi. 204.

## CHAPTER IX.

OF THE POSSESSION OF TITLE DEEDS—OF THE REGISTRATION OF DEEDS RELATING TO PROPERTY LYING IN THE REGISTER COUNTIES—AND OF FRAUD IN A PRIOR INCUMBRANCER.

### SECTION I.

OF THE POSSESSION OF TITLE DEEDS.

THE possession of the title deeds is a matter of the first consideration with every person having an incumbrance on realty, the want of them in many instances leading to the most serious consequences. Judge Buller, indeed, is reported to have said, “that it is an established rule in a court of equity that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall be preferred; because if a mortgagee lends money upon mortgage, without taking the title deeds, he enables the mortgagor to commit a fraud.” (a) And this position is fully

(a) Goodtitle v. Morgan, 1 Term 168. 2 Anstr. 440.  
Rep. 762. 1 Ves. 360. 1 Atk.

borne out by the case of *Stanhope v. Earl Verney*,<sup>(b)</sup> where the second mortgagee, without notice, having the *custody of the deeds* respecting a term for years, and also a declaration of trust, was preferred to a first mortgagee, who had a declaration of trust only. But the rule, as thus laid down by Buller, is confined to the case of a mortgagee not taking possession of the title deeds, where the legal estate is outstanding and out of him ;<sup>(c)</sup> for, as Mr. Fonblanque observes, to lay it down as applicable to every case, in which the mortgagor appears in possession of the deeds, at the time of the second mortgage, were not only to break in upon the authority of many decisions, but also, under some circumstances, to endanger the equity which it professes to promote. It would postpone the first mortgagee of an estate, held in joint-tenancy, or in common, the joint-tenants being equally entitled to possession of the deeds. The whole of the premises contained in the deeds must be in mortgage, though the intent of the parties might extend to only a particular part of them ; or the mortgagee of the part must retain the possession of the deeds which respect the whole.<sup>(d)</sup> Wherefore it is now settled that nothing but fraud or gross and voluntary negligence on the part of the first mortgagee, in leaving the title deeds with the mortgagor, shall be a reason for postponing his priority.<sup>(e)</sup>

Therefore, where it appeared that the mortgagor obtained possession of the title deeds from the first mortgagee, upon a reasonable pretence, Lord Cowper dismissed the

(b) In Chancery, July 27, 1761.  
Butl. note to Co. Lit. 290. b. sec.  
13. S. C. 2 Eden. 81.

(c) See *Plumb v. Fluitt*, 2 Anstr.  
440.

(d) 1 Fonbl. Treat. Eq. 164. 6  
Ves. 190.

(e) *Tourle v. Rand*, 2 Bro. C.C.  
652. *Evans v. Bicknell*, 6 Ves. 183.  
*Barnett v. Weston*, 12 Ves. 130.  
133. *Plumb v. Fluitt*, 2 Anstr.  
432. *Gillespie v. Coutts, Amb.*  
652.

bill brought by the second mortgagee to postpone the first. (f)

But in such case, if the first mortgagee, upon having the deeds returned to him, has also notice that the property has been mortgaged to another person, and makes no complaint or exception thereto, but remains for a long time quiescent, this, together with the long acquiescence, would amount to an implied consent on his part to the subsequent mortgage, and would postpone him. (g)

Where it appeared that the first mortgagee had required, and was assured by the mortgagor that he had delivered to him, all the deeds, Lord Thurlow held that there must be a *voluntary* leaving of the deeds to entitle the second mortgagee to gain a priority. (h)

So where deeds were lodged in the hands of a third person, as an escrow, to be delivered over when the vendee should pay the residue of purchase money, and the vendor obtained possession of the deeds, and deposited them to one as a security, it was compared to the case of a first mortgagee leaving the deeds in the mortgagor's possession: but it was held that the vendee might recover the deeds on payment of the residue of the purchase money, because a wrong was committed when the third person parted with the possession of them. (i)

So where lands were vested in trustees, first, upon trust to raise a sum of 35,000*l.*, and next upon trust to indemnify the lenders of the 35,000*l.* against a rent charge of 400*l.* a-year, and a portion of 5000*l.*, and the trustees raised 5000*l.*, part of the 35,000*l.*, by purchasing an an-

(f) *Peter v. Russell*, 1 Eq. Ca. Treat. Eq. 165. S. C. 2 Bro. C. C. Abr. 321. pl. 7. S. C. 2 Vern. 726. 652. note.  
S. C. Gilb. 122.

(g) *Mocatta v. Murgatroyd*, 1 Camp. 121. S. C. 6 Taunt. 12. S. C. P. Wms. 393. 2nd Resol. 1 Mar. 414.

(h) *Penner v. Jemmett*, 1 Fonbl.

nuity; and a subsequent mortgagee brought his bill to postpone the annuitant, because he had neglected to take possession of the title deeds, the vice-chancellor dismissed the bill with costs; because, with respect to the annuitant, not only the possession of the title deeds was not legally incident to his estate, nor was he required to stipulate for the possession of them, but it would have been a breach of trust on the part of the trustees to have given to one incumbrancer those instruments which they were bound to keep for the common security of all the persons advancing money upon the credit of their trust. (k)

Again it was held by Lord Thurlow that the mortgagee of a reversion, not having the title deeds, should not be postponed to another mortgagee, whose mortgage was made after the mortgagor came into possession, and who had the title deeds, because there was neither fraud nor gross negligence in the first mortgagee; for, at the time of his mortgage, the deeds were in the hands of the tenant for life, and he could not compel him to give them up; and, though after his death he might have filed a bill against the mortgagor for delivery of the deeds, yet that was not sufficient to charge him. (l)

But though courts of equity will not, on such grounds, postpone a first mortgagee, yet they will not take from a second mortgagee the title deeds, unless the first mortgagee pay him his money; thus allowing him all the benefit he can have from the deeds, but giving him no interest in the estate. (m)

And, indeed, the allowing a *bonâ fide* purchaser or mortgagee for valuable consideration, and without notice, the full benefit of the advantage to be derived from the possession of

(k) *Harper v. Faulder*, 4 Mad. 129.

(l) *Tourle v. Rand*, 2 Bro. C. C. 650.

(m) *Head v. Egerton*, 3 P. Wms. 280. 2 Ves. and Bea. 83. S. C. cited by Lord Eldon, 9 Ves. 33.

title deeds, is a principle upon which a court of equity always proceeds. And it is upon this ground that a court of equity prefers a subsequent incumbrancer, having the custody of the deed, creating a term, to a prior incumbrancer; and it will not compel him to produce that deed to his prejudice. (*n*) So if one take a mortgage from a tenant for life, representing himself to be seized in fee, and take also the possession of the title deeds, a court of equity will not compel him to discover the deeds in favour of a remainder-man or reversioner, to enable him to maintain an action of trover or detinue, or force him to deliver up the deeds. (*o*) And, though the mortgagee may not be in possession of the lands, a court of equity will not take the possession of the deeds from him; which last was decided by Lord Eldon, after great consideration; (*p*) and overrules a decision by Lord Rosslyn, holding that a plea of purchase, without notice, was not sufficient to a bill for discovery, unless the mortgagee had also the possession of the lands. (*q*)

And here we may observe that in *Strode v. Blackburne*, it is laid down by the Lord Chancellor, that if a mortgage was made by the owner of an estate, partly settled and partly unsettled; and during the possession of that owner the boundaries had been confounded; if a person entitled under the settlement filed a bill to compel the mortgagee to set out, not the title by which he claimed, but the metes and bounds of the estate subject to his mortgage, the mortgagee would be obliged to discover the boundaries: but the validity of this position, particularly since the case of *Wallwyn v. Lee*, which attacks the whole doctrine of *Strode v.*

(*n*) *Ex parte Knott*, 11 Ves. 613. 454. *Brampton v. Barker*, cited 2 Willoughby v. Willoughby, 1 Term Vern. 159. Anon. 2 Cha. Ca. 4. 1 Rep. 772. Bro. C. C. 581.

(*o*) *Wallwyn v. Lee*, 9 Ves. 24. (*p*) *Wallwyn v. Lee*, 9 Ves. 24. *Strode v. Blackburne*, 3 Ves. 222. (*q*) *Strode v. Blackburne*, 3 Ves. *Jerrard v. Saunders*, 2 Ves. jun. 222.

Blackburne, seems very questionable. But if the mortgage be of only part of an estate, and the heir cannot tell what is in mortgage and what not, in such case it seems a court of equity would decree the mortgagee to discover the boundaries. (r)

If a person mortgage who has no right to mortgage, as a person to whom deeds are delivered over to be kept for a particular purpose, depositing them to one for a debt of his own, the true owner may recover the deeds; for it was the mortgagee's own fault to take the deeds without looking into the title. (s)

In the instance before alluded to of a mortgage by a tenant for life, representing himself to be seized in fee, if the remainder-man or plaintiff claimed only subject to the title of the mortgagee, and submitted to pay off the money, the Court would not prevent him from recovering the deeds. (t)

In *Evans v. Bicknell*, (u) where a tenant for life had mortgaged in fee, it became a question whether a trustee of a settlement, having the title deeds in his possession, and delivering them over to the tenant for life (which in that case enabled him to mortgage) was answerable to the persons in remainder; and it was held that the trustee was not answerable unless he was privy to the fraudulent intention of the tenant for life, or had been guilty of fraud or negligence so gross that it amounted to constructive fraud, that is, such evidence of fraud that he shall not be heard in a court of justice to say that there was no fraud.

Notice that the title deeds are in another person's possession is constructive notice to a subsequent incumbrancer of all the claim which that other person has on the estate,

- (r) *Glynn v. Scawen*, Rep. temp.      dolphin, Cha. Prec. 548.  
*Finch* 239.      (t) *Head v. Egerton*, 3 P. Wms.  
      280. 2 Atk. 332. 3 Mad. 244.  
 (s) *Jackson v. Butler*, 2 Atk.      See also 9 Ves. 33.  
 306. *Hooper v. Ramsbottom*, 4  
*Camp.* 121. S. C. 6 *Taunt.* 12. S. C.  
 1 Mar. 414. See also *Opie v. Go-*  
      (u) 6 Ves. 174. 192, 193.



and will postpone him to such third person. (x) And even notice that the mortgagor has not the deeds in his own possession puts the mortgagee under the obligation of making further enquiry. (y)

But if a person were to take a mortgage for an old debt from a trader in declining circumstances with an assurance that the deeds should be delivered over to him the next day, and without any other evidence of notice of their being deposited with a third person as a security than what arose from their not being forthcoming at the time of his mortgage, the mortgagee would have a preference in payment to the equitable lien of the deposit; as was decided in *Plumb v. Fluitt*. (z) In the same case Eyre, Chief Baron, said—"It is said, no man will advance money upon an estate without seeing the title-deeds, unless with a fraudulent intention. I wish I saw in a court of equity some solid distinction established between a consideration which is an old debt, and a sum advanced *de novo*. There certainly is a great difference: in the one case the creditor jumps at any security he can get; he takes the deed of conveyance now, and trusts to getting the title deeds afterwards: but, till such a distinction is established, it is difficult to apply the reasoning which would belong to it. The person who takes the legal estate without the deeds, in a case like this, appears to me, unless there be fraud, to be less blameable than he who takes the deeds without the estate."

The decision in *Plumb v. Fluitt*, I think, furnishes two inferences:—1st, That a mortgagee, by deposit of deeds, has one chance more than a mortgagee of the legal estate of being defeated of his security; and, 2dly, That under circumstances a subsequent incumbrancer having

(x) *Birch v. Ellames*, 2 Austr.

(y) 13 Ves. 122.

427. *Hiern v. Mill*, 13 Ves. 114.

(z) 2 Austr. 432.

1 Mar. 416.

the legal estate in an outstanding term for years would be preferred to a former incumbrancer who had only the deeds relating to that term.

## SECTION II.

### OF THE REGISTRATION OF DEEDS RELATING TO PROPERTY LYING IN THE REGISTER COUNTIES.

The registry acts have given rise to questions respecting tacking, and the priority of incumbrances. By those acts it is enacted that all deeds and devises which may in anywise affect lands, tenements, or hereditaments, in the three ridings of the county of York, the town and county of Kingston-upon-Hull, and in Middlesex, shall be adjudged fraudulent and void against subsequent purchasers and mortgagees for valuable consideration, unless registered as therein mentioned. But these acts do not extend to copyhold estates, to leases at rack rent, or to leases not exceeding twenty-one years, where the actual occupation and possession go along with the lease. And the act for the county of Middlesex (*a*) does not extend to any of the Chambers in Serjeants' Inn, the Inns of Court, or Inns of Chancery. And by the better opinion also it appears that the act for Middlesex does not extend to lands, &c. in the city of London. (*b*)

By these acts it is also further enacted, that no judgment, statute, or recognizance, (other than such as shall be entered into in the name and upon the proper account of the King, his heirs, and successors,) shall bind any such estates as aforesaid, but only from the time that a me-

(*a*) 7 Ann. c. 20:

580. 4th edit.

(*b*) Sugd. on Vend. and Pur.

morial thereof shall be duly entered. The acts for the East (c) and West (d) Ridings of York, and Kingston-upon-Hull, (e) indeed, having a retrospective effect, and making judgments, &c. binding from the time of acknowledging or signing, if registered within thirty days after. And the act for the North (f) Riding of York, making them binding in like manner, if registered within twenty days after.

From the generality of the expression in these acts, it is easy to perceive that every deed, which may in *anywise* affect lands in the register counties, must be registered, unless falling under one or other of the exceptions. Therefore, where it was contended that an appointment under a power need not be registered, because the appointee took not under the appointment, but under the original deed, which was registered, Sir John Strange said, that if that construction were to prevail, there would be an end of the registry and of the act of parliament; for by this means a secret deed might be set up to defeat him who had registered before; and held that the appointee should be postponed to a subsequent mortgagee who had duly registered. (g)

And from the acts having prescribed a mode of registry, it follows that every purchaser or mortgagee should implicitly comply with the requisitions, and that his neglect in any particular will exclude him from the benefit of the statutes in favour of a subsequent purchaser or mortgagee, whose assurance is duly registered. Thus, in an action before Lord Hardwicke, C. J., where the defendant claimed under a lease made in 1730, which was soon after mortgaged, and then sold out and out to the de-

(c) 6 Ann. c. 35.

(f) 8 Geo. 2. c. 6.

(d) 2 and 3 Ann. c. 4. 5 Ann. c. 18.

(g) *Scrafton v. Quincey*, 2 Ves. 413.

(e) 6 Ann. c. 35.

pendant, the original lease was not registered, but the first mortgage of it and the defendant's purchase were. And it not being a lease at rack rent, the question was, whether this was a registry within the meaning of 7 Ann. c. 20. His Lordship held it not to be sufficient; for the act says, the deed under which the party claims, with the witnesses' names, shall be registered; and of this a subsequent purchaser can have no notice by the bare registry of the assignment, and it is also required that the original be produced to the officer. (*h*)

The first exception in the registry acts relates to copyhold estates. This, it seems, cannot extend to a lease for years of copyholds granted under a licence from the lord; for such lease for years is a common law interest. It is, therefore, advisable to register leases of copyholds granted under a licence, unless such leases fall within either of the other two exceptions in the acts; or, as Mr. Sugden has expressed it, it is proper to register "such leases of copyhold estates, as, if the estate were freehold, would require registry." (*i*)

The next exception relates to leases for years granted at a rack rent, which cannot possibly extend to a mortgage for years, unless we can suppose such an improbable event as a mortgage security reserving the full value; thereby, in fact, making it no security. And if the lease be originally at rack rent, it is said that no subsequent assignment of it need be registered, though the property should afterwards rise in value. (*k*) But I conceive, that if a lease, originally at rack rent, be assigned over or underlet, by way of mortgage, the assignment or derivative lease must be registered, unless the mortgagee takes possession. And this, as

(*h*) *Honeycomb v. Waldron*, 2 Stra. 1064.

(*k*) *Sugd. on Vend. and Pur.* 579. cites *Rigge on Registry*, 88,

(*i*) *Sugd. on Vend. and Pur.* n. (*n*)  
579. 4th edit.

well under the express words of the registry acts, as under the practice which has taken place, of registering mortgages of leases which originally fall within the third exception.

The third exception in the registry acts exempts leases not exceeding twenty-one years, where the actual possession and occupation go along with the lease, from being registered. But it is always usual in practice to require a beneficial lease, not exceeding twenty-one years, to be registered, where it is assigned by way of mortgage. (*l*)

The effect of the registry acts as to tacking and priority is now to be considered.

Where a man made a mortgage of lands in Middlesex, and the same was duly registered; afterwards he made a mortgage to another person, which was also registered according to the statute; and, after the making that second mortgage, the first mortgagee advanced a further sum of money to the mortgagor on the premises, without notice of the second mortgage. And the question was, whether the registry of the second mortgage was constructive notice, so as the money lent subsequent to it should not be paid off till that was satisfied; and it was held by King, Chancellor, that it was not; for the statute declares deeds not registered void, as against purchasers, but gives no greater efficacy to deeds registered than they had before the making of the statute. And it is a known rule in a court of equity that when the first mortgagee advances a further sum of money without notice, after a second mortgage made, that he shall be paid his whole money in the first place. (*m*) And it was decided in the same manner, and for the like reason, by Sir Joseph

(*l*) Sugd. on Vend. and Pur. 579,  
580. 4th edit. cites Rigge on Reg.  
88, n. (*o*).

(*m*) Bedford v. Backhouse, or  
Bacchus, Wm. Kely. 5. S. C. 2  
Eq. Ca. Abr. pl. 12.

Jekyll, upon a case similar in every respect to the last, arising of lands in Yorkshire. (*n*)

From these decisions it follows, that if a mortgagee lend a further sum without notice of the sale of the equity of redemption, or of a subsequent mortgage, the purchaser, or second mortgagee, cannot redeem without paying off both sums, although the estate is in a register county, and his conveyance or mortgage is duly registered.

And upon the same principle it has been held that if a mortgagor pays off mortgage-money to a mortgagee without notice of his having transferred the mortgage, it is a valid payment, though the transfer was previously duly registered. (*o*)

It becomes, therefore, every person who claims any interest under a mortgagee of lands in a register county, to give notice of his claim to the mortgagor immediately that his claim commences; and so every person claiming under the mortgagor should give notice of his claim to the mortgagee. (*p*)

The principle of the decisions, last alluded to, by Lord Chancellor King and Sir Joseph Jekyll, has been confirmed to the full extent by Lord Chancellor Camden in *Morecock v. Dickens*. (*q*) There the question arose, whether a person purchasing without notice, and obtaining the legal estate, shall be prejudiced by a prior equitable incumbrance, which was duly registered previous to his purchase. And it was decided that he shall not. Lord Camden, in pronouncing judgment, said, “If this was a new point, it might admit of difficulty: but the determination in *Bedford v. Bacchus* seems to have settled it; and it

(*n*) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609, pl. 7. S. C. Rigge on Reg. 6.

(*o*) *Williams v. Sorrell*, 4 Ves. 389.

(*p*) *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609. pl. 7. S. C. Rigge on Reg. 6.

(*q*) *Ambl. 678. In Chan. 1768.*

would be mischievous to disturb it. The act provides for one single case only ; that is, to make unregistered deeds void against registered deeds. But there is no provision by the act in a case where all the deeds are registered. And yet it becomes a serious question, whether a court of equity would not say that in all cases of registry, which is a public depository for deeds, and to which any person may resort, a subsequent purchaser ought to search, or be bound by notice of the registry, as he would of a decree in equity, or a judgment at law. It is a point in which a great deal of property is concerned, and is a matter of consequence. Much property has been settled, and conveyances have proceeded upon the ground of that determination. In the case of *Vandebendy* in the House of Lords, the doctrine about dower prevailed, because it had been practised in a course of conveyance. A thousand neglects to search have been occasioned by that determination ; and, therefore, I cannot take upon me to alter it. If it were a new case, I should have my doubts : but the point is closed by that determination, which has been acquiesced in ever since." This decision seems clear and conclusive ; and to rest upon solid ground, that of practice and the security of titles. But Mr. Sugden expresses himself as dissatisfied with it ; and argues that it can be considered as an authority only so far as it is authorized by the case upon which Lord Camden professes to ground his opinion. But the case of *Bedford v. Backhouse*, he contends, is not an authority in point. " In the case of *Bedford v. Backhouse*," he says, " by the known and settled rule of equity the first mortgagee was entitled to hold against the second mortgagee unless he had notice ; and as the second mortgagee had it in his power to give such notice, and neglected doing so, the decision seems perfectly proper. But, in the case before Lord Camden, the prior incumbrancer had no means whatever to acquaint

the purchaser with the incumbrance, while he himself had it in his power to ascertain whether the estate was incumbered. Where the neglect is the purchaser's,—who else should bear the loss occasioned by that neglect? Besides, it seems clear, that no person, *not being seised of the legal estate*, could ever have been induced to neglect searching the register on the authority of any of the cases on this subject, much less on that of *Bedford v. Backhouse*.” (r) Now, whatever force there may be in these arguments, and though the circumstances of the case of *Morecock v. Dickens* were very dissimilar from those of *Bedford v. Backhouse*, yet I conceive that Lord Camden did no more than act up to the principle laid down by Lord King. The principle of Lord King’s decision was, that the statutes of registry gave no greater efficacy to deeds registered than they had before the making of those statutes; and in this I conceive he was fully borne out by the construction which had been put on the statute of enrolments. The statute of enrolments says, that no bargain and sale shall be good to pass any use except it be enrolled. The statute of registry enacts that all deeds and conveyances shall be void as against a subsequent purchaser or mortgagee, unless registered. They were both passed for the notoriety of titles; and, if a subsequent purchaser has notice of a bargain and sale not enrolled, or of a deed not registered, in either case his conscience will be affected. (s) It appears to me that, to hold that the registry of a deed shall be evidence of notice to a subsequent purchaser, is as much as to hold that the enrolment of a bargain and sale shall be constructive notice. But this was never so held;—why then shall the registry of a deed under the statute of Anne be considered as constructive notice? Besides, when Lord

(r) Sugd. on Vend. and Pur. 584.  
4th edit.

(s) See 3 Atk. 652. 1 Ves. 66.



Camden put his decision upon the security of title, he rested it upon the highest foundation, an argument which was considered conclusive in the House of Lords in *Radnor v. Vandebendy*. (t) We have no right to presume that Lord Camden was mistaken in his idea of the practice. And if the practice had prevailed, as he has stated, in 1768, upon the case of *Bedford v. Backhouse*,—how much rather must it have since prevailed upon the case of *Morecock v. Dickens*? and how much more difficult would it now be to overturn that decision? But we have attempted to reconcile it both to principle and practice; and I find that Lord Camden's decision, and the arguments above adduced in support of it, are supported by Lord Hardwicke's decision in *Le Neve v. Le Neve*, in Chancery, in 1747. (u) The insecurity, therefore, of an equitable charge on an estate in a register county, although it is duly registered, and there is no incumbrance on the register, is apparent.

The case of *Morecock v. Dickens* seems to establish that, upon a question between a first incumbrancer whose security is duly registered, and a second incumbrancer, without notice of the first, whose security is also duly registered, the case must be considered as independent of the statutes of registry. Wherefore it follows, that if there were three mortgagees of an estate, whose several incumbrances were duly registered, the third mortgagee might, by taking in the first mortgage, acquire a priority over the second; for he has as much equity as the second mortgagee, as also the law on his side, which equity would not take from him.

But if a subsequent purchaser or mortgagee have notice of a prior mortgage or incumbrance not duly registered, or not registered at all, he will be bound by such prior

(t) *Show. Par. Ca.* 69.*S. C.* 3 *Atk.* 646.(u) 1 *Ves.* 64. *S. C. Amb.* 436.

mortgage or incumbrance, though he should take a conveyance, and get it registered first; for such conduct is considered fraudulent on his part, as he has that notice which the act intended he should have. (x) But it should be observed that though the subsequent purchaser or mortgagee would, in a case of this nature, be postponed to the prior mortgage or incumbrance, yet the legal estate would be in him by force of the statute; and that the prior mortgagee's or incumbrancer's relief would be only in equity. (y)

The words of these acts with respect to deeds are, "that every such deed or conveyance shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchasee or mortgagee shall claim;" and the acts do not limit any time for registering *deeds*; it is, therefore, obvious how necessary it is that deeds should be registered immediately on their being executed. To enforce this the more strongly, it may not be useless to consider, if a subsequent conveyance or mortgage should be executed for a valuable consideration, and from an almost momentary inattention or delay of the first vendee or mortgagee in not immediately registering, the second vendee or mortgagee should register first; whether, in such case, the first vendee or mortgagee does not thereby

(x) Lord Forbes v. Deniston, 2 Bro. P. C. 425. S. C. 2 Eq. Ca. Abr. 482. pl. 19. Cheval v. Nichols, 1 Stra. 664. Beatniff v. Smith, 1 Eq. Ca. Abr. 357. pl. 11. Blades v. Blades, 1 Eq. Ca. Abr. 358, pl. 12. Hine v. Dodd; 2 Atk. 275. Le Neve v. Le Neve, 3 Atk. 646. S. C. 1 Ves. 64. Amb. 436. Sheldon v. Cox, Amb. 624. And see 1 Burr. 474. 1 Scho. and Lef. 103, 157, and Biddulph v. St. John, 2 Scho. and Lef. 521.

(y) Cowp. 712. 3 Atk. 647. 651.

become in a worse situation than he would have been by law in case the registering act had not been made. (z)

But devises by will are declared fraudulent only in case they are not registered within six months after the death of the devisor or testatrix dying within Great Britain, or within six months after his or her death dying upon the seas, or in parts beyond the seas. This provision is the same in all the acts: but different provisions are made in the several acts in case the will is contested or suppressed. If the devisee of an estate within any of the three Ridings of the county of York, or the town of Kingston-upon-Hull, be disabled to exhibit a memorial within the time limited, by the suppression or contesting of the will, or other inevitable difficulty, then a memorial entered of such impediment within six months after the death of such devisor or testatrix, dying within Great Britain, or within three years after his or her decease dying upon the seas, or in parts beyond the seas; and a memorial of such will, also registered within six months after the recovery of the will, or a probate thereof, or removal of such impediment, is considered a sufficient registry within the meaning of those acts. The act for the North Riding, (a) however, declares that, in case of any concealment or suppression of any will or devise, no purchaser for valuable consideration shall be defeated or disturbed in his purchase; and that no plaintiff in any judgment, or cognizee in any statute or recognizance, shall be defeated of his debt by any title made or devised by such will, unless the will be actually registered within three years after the death of the devisor or testatrix. And the act for the county of Middlesex (b) provides that, in case of any suppressed or con-

(z) Mr. Hilliard's note to Shep. Touch. 113. 5th edit. See 1 Scho. and Lef. 160.

(a) 8 Geo. 2. c. 6. s. 17.

(b) 7 Ann. c. 20. s. 9. and 10.

tested will, or other inevitable difficulty, a memorial of such contest or other impediment, within two years after the death of the devisor or testatrix dying within Great Britain, or within four years if he or she shall die upon the seas or in parts beyond the seas, and a registry of the will itself within six months after the recovery or probate thereof, or after the impediment removed, shall be a sufficient registry within the meaning of the act. But there is also a proviso like that in the act for the North Riding of York, declaring that, in case of any concealment or suppression of any will or devise, no purchaser shall be defeated or disturbed in his purchase, unless the will be actually registered within five years after the death of the devisor or testatrix.

Judgments, statutes, and recognizances, are also declared binding from the time of the signing, or acknowledging, if registered within thirty days afterwards, by the statutes for the East (c) and West (d) Ridings of York and town of Kingston-upon-Hull; (e) and, if registered within twenty days afterwards by the statute for the North Riding of York, (f) but otherwise they are binding from the time of registration. But the act for Middlesex declares them binding only from the time that a memorial thereof shall be registered. (g)

But, as these acts in many instances publish to the world the declining circumstances of an individual, they also give him power to recover his credit by declaring that when any mortgage shall be paid off or satisfied, an entry of such satisfaction may be made in the margin against the memorial of the mortgage. The acts for the

(c) 6 Ann. c. 35. s. 28.

(f) 8 Geo. 2. c. 6. s. 33.

(d) 5 Ann. c. 18. s. 11.

(g) 7 Ann. c. 20. s. 18.

(e) 6 Ann. c. 35. s. 28.

three Ridings of the county of York and town of Kingston-upon-Hull make also the same provision for entering satisfaction on any judgment, statute, or recognizance. But there is nothing in any of these acts to hinder a mortgagor or cognizor from proving *aliunde* that the mortgage, judgment, &c. are paid off.

We must recollect that the registry acts were made only for the protection of subsequent purchasers, mortgagees, and strangers; and that they have no effect as between the parties themselves, or their representatives; and that therefore a mortgage or conveyance will be binding upon the mortgagor or grantor and his assignees in bankruptcy, though not registered. (*h*)

In Ireland there is a general registry act. And there too the deed is binding as between the parties, though not registered. For by the Irish act, 6 Ann. c. 2. s. 3., it is enacted (in the same manner as by the 2 and 3 of Anne which laid the foundation of our registry acts) that a memorial of all deeds and conveyances, and of all wills and devises, which may in anywise affect lands, tenements, or hereditaments within that kingdom, may, at the election of the party or parties concerned, be registered in such manner as therein directed.

The 4th section enacts, “ That every such deed or conveyance, a memorial whereof shall be duly registered according to the rules of this act prescribed, shall be deemed and taken as good and effectual both in law and equity, *according to the priority of time of registering such memorial*, for and concerning the honors, &c. in such deed or conveyance mentioned or contained according to the right, title, or interest, of the person or persons so conveying such honors, &c. against all and every other deed, conveyance, or disposition, of the

(*h*) Jones v. Gibbons, 9 Ves. 407.

“ honors, &c. or any part thereof, comprized or contained in  
“ any such memorial as aforesaid.” This clause is not in the  
English acts. The 5th section of the Irish act resembles  
the provisions in the English acts, “ That every deed or  
“ conveyance, not registered of any land, &c. contained  
“ in a registered deed, shall be deemed and adjudged as  
“ fraudulent and void, as against such registered deed or  
“ conveyance.” (i)

This difference in the Irish and English acts has produced a difference in the decisions upon them. For the question whether a registered deed was to have priority of another registered deed, according to the priority of registry, and how far this priority was to extend, has received a different determination in England and in Ireland ; and that difference is founded, not on the registry of a deed in Ireland being considered as notice, but on the words of the 4th section of the Irish act.

Upon a case which occurred in Ireland upon the Irish registry act Lord Redesdale is stated to have said, “ I have no sort of doubt of the true construction of this act. The instrument registered must prevail against a subsequently registered instrument by force of the clause in the 4th section : that being an instrument which affects lands, it shall be good, not only at law, but in equity, according to the priority of registry. This is not at all grounded on the next section of the act, which avoids unregistered conveyances ; that is a provision of a totally different description. The meaning of the former clause, I take it, is to give full effect by force of the registry, even to articles, if registered against a legal conveyance : so that the act has given to contracts registered a force and effect with respect to lands themselves, which they have not in England, there being no such clause in the English registry act.

(i) These enactments are stated, 1 Scho. and Lef. 98.

This I take to be the true meaning of the act, as far as I can collect; and it will answer all the purposes of every decision on the subject.” (*k*)

Hence it follows that the case of *Morecock v. Dickens*, above cited, would have received a different determination under the Irish registry act. And it follows also that in Ireland, if there be a first mortgage duly registered, and also subsequent registered incumbrances, the first mortgagee cannot tack a subsequent advance to his mortgage. So that the case of *Bedford v. Backhouse*, or *Bacchus*, which we have already had occasion frequently to notice, would also have received a different determination under the Irish act. And it follows also, that a subsequent mortgagee, without notice of intervening registered incumbrances, cannot in Ireland take in a first mortgage, so as thereby to acquire a priority of payment as to his second mortgage over the intervening incumbrances: but that all the incumbrancers must be paid according to their priority. (*l*)

It has been determined under the Irish act that, if a person has *notice* of a prior unregistered deed, he will be bound by it; for he has that notice which the act intended he should have. He cannot say he is defrauded: on the contrary, it is fraudulent in him to take a conveyance to defeat the charge of another. (*m*)

But though, registered deeds in Ireland take effect according to their priority, whether they be equitable or legal conveyances, and whether one and the same person has both a legal and an equitable incumbrance or not;

(*k*) *Bushell v. Bushell*, 1 Scho. Bro. P. C. 425. cited and stated and Lef. 102. And see *Daly v. Kelly*, 4 Dow. 436. also in 1 Ves. 67. 3 Atk. 653.—Amb. 444. 1 Scho. and Lef. 99. 100.

(*l*) *Latouche v. Lord Dunsany*, Underwood v. Curtown, 2 Scho. 1 Scho. and Lef. 137. and Lef. 41. *Biddulph v. St. John*,

(*m*) *Lord Forbes v. Deniston*, 2 2 Scho. and Lef. 521.

yet, that is under the express words of the 4th section of the Irish act. For the registry of a deed in Ireland is not of itself any notice of that deed, any more than it is in England, or in the Colonies, where it has been uniformly held, that even enrolments are not considered as notice. The effects of considering a registered deed notice would be truly mischievous; for though it is true that the registry is considered as notice to a certain extent, as no person thinks of purchasing an estate without searching the registry, and if he searches he has notice; yet it cannot be considered as notice to all intents. For, as was said by Lord Redesdale, if it be so, it must be taken as notice of every thing that is contained in the memorial: if the memorial contains a recital of another instrument, it is notice of that instrument; if of a fact, it is notice of that fact. Besides, if it be notice, it must be notice, whether the deed be duly registered or not. It may be unduly registered; and if it be so, the act does not give it a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites. (n)

There is also a material variation in the English registry acts, which may affect the priority of incumbrances, and which remains still to be noticed. The registry acts for the county of Middlesex, the East and West Ridings of York, and Kingston-upon-Hull, seem to contemplate only the security of subsequent purchasers and mortgagees for valuable consideration. But the act for the North Riding of York is more comprehensive in its effect; and declares that deeds, wills, judgments, statutes, and recognizances, unless registered as therein mentioned, shall be deemed fraudulent and void, not only as against subsequent purchasers or mortgagees, but also as against any *plaintiff or cognizee*, for valuable consideration claiming *under any*

(n) *Bushell v. Bushell*, 1 Scho. Lord Dunsany, 1 Scho. and Lef. and Lef. 90. 103. *Latouche v.* 157. 2 Scho. and Lef. 66.



*subsequent judgment, statute, or recognizance*, duly registered.

Hence, if there were a mortgage of lands in Middlesex not registered, and then a judgment duly registered, and then another mortgage, which was also duly registered, a difficulty would arise how these incumbrances should be paid; for under the statute of the 7th of Ann. the second mortgagee would have a priority over the first mortgagee, but none over the judgment creditor. And under the same statute the judgment creditor would be preferred to the second mortgagee: but as to the first mortgage he would be left as at common law, and therefore could only claim subject to it.

By the construction put upon the Irish registry act, a subsequent registered judgment will in every case take place of a prior unregistered mortgage, provided the judgment creditor had no notice; (*o*) which makes the Irish act agree with our statute for the North Riding of York. (*p*)

### SECTION III.

#### OF FRAUD IN A PRIOR INCUMBRANCE.

The priority of payment of incumbrances, according to their several dates, may also be lost by any fraud or artifice of the first mortgagee, in concealing his own mortgage for the purpose of inducing another person to lend money on the same lands. For if a man by the suppression of truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to equity and the prin-

(*o*) *D'Arcy v. Chambers*, 1 Scho. Lef. 160, 161.  
and Lef. App. 467. See also *Latouche v. Dunsany*, 1 Scho. and (p) 8 Geo. II. c. 6.

ciples of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his misrepresentation. (*q*)

Therefore, where a mortgagee was present when the mortgagor was in treaty for the marriage of his son with the father of A., the son's intended wife, and the lands encumbered were agreed to be settled, upon this marriage, to the husband for life, remainder to the issue, male and female; and it was not opposed by the mortgagee, but he fraudulently concealed his mortgage, and at the same time privately assured the father of the son that he would trust to his personal security; it was decreed that the son and his wife, and the issue of this marriage, should hold the lands quietly and peaceably against the mortgagee and his heirs. And the mortgagee was directed to assign the mortgage to trustees, one to be named by himself, and the other by the son, to attend the limitations of the settlement. In case the son died without issue of the marriage, or the estates limited by the marriage determined, the parties were at liberty to apply to the Court for further directions; the Lord Chancellor at the same time declaring that he would not determine whether the conduct of the mortgagee was to be considered fraudulent as to the issue which the son might have by any after marriage. The injunction to stay the mortgagee's proceedings was made perpetual; and he was saddled with the costs, both at law and in equity, and of making the assignment to the trustees. (*r*)

So where H., a mortgagee of the manor of T., had also a statute against the mortgagor, and being a counsellor, and advised with by A., as to a mortgage on the manor of G., he encouraged the loan by A. drew the mortgage, and inserted a covenant that the estate was free from incum-

(*q*) 1 Fonbl. Treat. on Eq. B. 1.  
c. 3. s. 4.

(*r*) Berrisford v. Milward, 2 Atk.  
49. S. C. Barnard. C. C. 101.

brances, making no mention of the statute. And, *per Curiam*, if he who only conceals his incumbrance ought to be postponed, much more ought H. And, accordingly, it was decreed that A. should be satisfied his mortgage out of G. before H. should charge the same with his statute. (s).

But if the party to whom the fraud is imputed was not conusant of the treaty in which the fraud was practised, nor in any manner, nor for any fraudulent purpose, confederating with the party practising the same, the above principle does not apply. (t)

Lord Chancellor Cowper, indeed, held that where a first mortgagee is a witness to the second mortgage deed, though no actual proof of his knowing the contents thereof; yet, since the presumption is that he might have known them, it shall postpone him. (u) But that is a doctrine which has not of late been acceded to; and it is now held that a witness in practice is not privy to the contents of the deed. (x)

But if, besides the fact of attestation as a witness, there be any other circumstance to charge him with notice of the contents of the deed, the first mortgagee will be postponed. As where a first mortgagee witnessed the deed, and told the money at his master's chambers. (y) So where a father tenant for life mortgaged, and the son tenant in remainder witnessed the deed, the Court gave relief on the foot of fraud, because the son did not give

(s) *Draper v. Borlace*, 2 Vern. 370.

(t) *Fonbl. Treat. on Eq. Vol. I. B. 1. c. 3. s. 4. note (n).*

(u) *Mocatta v. Murgatroyd*, 1 P. Wms. 393. But see the note to that case by Mr. Williams.

(x) *Rancliffe v. Parkins*, 6 Dow.

224. *Becket v. Cordley*, 1 Bro. C. C. 357. *Welford v. Beezely*, 1 Ves. 6.

(y) *Clare v. The Earl of Bedford*, cited 2 Vern. 151. 9 Mod. 38. 1 Ves. 96. *Raw v. Pote*, 2 Vern. 239.

the mortgagee notice of his title. (z) And though the son in this last case was an infant, yet that did not avail him. For neither infancy (a) nor coverture (b) will be admitted as any excuse for fraud.

In the cases just noticed we may observe that the person having the first claim was in some manner concerned in the second mortgage: but the bare knowledge of a treaty for a second mortgage is not, as it seems, sufficient to postpone the first mortgagee. And so Lord Hardwicke is reported to have been of opinion; for it would be very hard for a mortgagee to be at the peril of losing his mortgage money, if he did not give notice of his mortgage to any person whom he knew to treat about the sale, or any settlement of the lands in his mortgage; and it very much differs from the case where the mortgagee himself helps to carry on such a treaty. (c)

But if a person, intending to advance money on lands, enquires by himself, or his agent, of another, whether he has any incumbrance or mortgage on the estate, and he denies that he has any, he will thereby lose his priority. (d) But then the enquiring person must state the reason of his enquiry; that it is in consequence of an intention on his part to advance money on the land. For, otherwise, it may be only the enquiry of idle curiosity, which the first incumbrancer is not bound to answer; (e) or, if he does answer, he may answer falsely. (f)

(z) *Watts v. Creswell*, 9 Vin. Ves. 181.

Abr. 415. pl. 24. S. C. cited as (c) *Osborn v. Lea*, 9 Mod. 96.

*Watts v. Hasewell*, 9 Mod. 38. S. C. (d) *Ibbottson v. Rhodes*, 2 Vern. 554.

cited as *Watts v. Treswick*, 9 Mod. 96. (e) *Pasley v. Freeman*, 3 Term

Rep. 51. 60.

(a) 1 Ves. 96. 1 Bro. C. C. 358. (f) *Ibbottson v. Rhodes*, 2 Vern.

9 Vin. 415. pl. 24. 554., and Mr. Fonblanque's note

(b) *Hunsden v. Cheney*, 2 Vern. 554., and Mr. Fonblanque's note

150. 2d edit. *Savage v. Foster*, 9 (n). to Treat. on Eq. Vol. I. B. 1.

Mod. 35. *Evans v. Bicknell*, 6 c. 3. s. 4.

If a person has it in his power to inform himself of his title to an estate, but through negligence, (g) or ignorance of the law, (h) does not know of his title, and encourages a sale of the estate; or, upon being applied to by a mortgagee, affirms that another person has a good right to make a mortgage; he cannot afterwards set up his own title to the prejudice of the purchaser or mortgagee.

But an affirmation that another person has a good right to mortgage, in a conversation with the agent of A. upon a contemplated mortgage to A., is not sufficient to postpone the person making the false representation to B., a subsequent mortgagee, though B. employed the same person as was agent to A. (i) But in such case there ought to have been a second inquiry when the mortgage to B. was contemplated.

But if the title deed of an estate be forcibly detained from one, whereby he is hindered from knowing his title, and he is induced to make a false representation through the effect of his ignorance, he will not be prejudiced thereby. (k)

If an attorney for the vendor of an estate knows of any incumbrances thereon, and treats for a sale, he is bound to disclose them to the purchaser or contractor, as much as a first mortgagee, who encourages a sale or second mortgage; and, if he does not disclose them, he will be chargeable to the purchaser in default of the vendor. And this is very different from disclosing the general circumstances of his client with the knowledge of which he is intrusted. (l)

And as a mortgagee may lose his whole security by neg-

(g) *Hobbs v. Norton*, 1 Vern. 136.

(i) *Pearson v. Morgan*, 2 Bro. C. C. \*388.

(h) *Hunsden v. Cheney*, 2 Vern. 150. *Pearson v. Morgan*, 2 Bro. C. C. \*388.

(k) *Dyer v. Dyer*, 2 Cha. Ca. 108.

(l) *Arnot v. Biscoe*, 1 Ves. 95.

lecting to inform a purchaser of it ; so he may as to part, if he misrepresents the sum actually due. And therefore, where there was 500*l.* due upon a mortgage for principal, and 210*l.* more for interest, and the mortgagee upon a treaty for the marriage of the mortgagor's daughter informed the intended husband's father that 500*l.* only was due upon the mortgage, it was held that such information discharged the lands from being liable to more than what was then pretended to be due ; and accordingly a redemption was decreed upon payment of 500*l.* with interest from that time. (*m*)

(*m*) *Barrett v. Wells*, Cha. Prec. 131.

## CHAPTER X.

## OF NOTICE.

**THE** whole doctrine of tacking, and of acquiring a priority in payment, depends upon the subsequent incumbrancer having had no notice of the intervening incumbrances, against which he seeks to tack, or over which he seeks to gain a priority ; it having been always held that notice of an incumbrance is sufficient to affect a purchaser or mortgagee, and to make him take subject to it. (*a*)

Which notice must be at the time of advancing his money ; for, if a subsequent mortgagee has no notice of a second incumbrance till afterwards, or till the taking in of a first, it will not affect him ; it is the very occasion which shews the necessity of his so doing. (*b*) But it is too confined to say that a mortgagee must have notice at the time of advancing his money ; because it will be equally binding upon him if he has notice in the same transaction. Thus, if the mortgagee has notice before actual payment of all

- (*a*) *Goddard v. Complin*, 1 Cha. Ves. 130. *Toulmin v. Steere*, 3 Ca. 119. *Anon.* 2 Cha. Ca. 35. Mer. 210. *Taylor v. Baker*, 5 Bacon *v. Ashby*, Finch, 366. Bedford *v. Backhouse*, W. Kely. 6. Price, 306.
- (*b*) *Edmunds v. Povey*, 1 Vern. 2 Vern. 575. *Shermer v. Robins*, 188. *Marsh v. Lee*, 2 Vent. 337. Finch, 406. *Shepherd v. Titley*, Wortley *v. Birkhead*, 2 Ves. 571. 2 Atk. 348. *Ithell v. Beane*, 1 674. *Cockes v. Sherman*, 2 Freem. Ves. 215. *Wynn v. Williams*, 5 13. See also ante 305, 306.

the money, though part of it be secured to be paid, (c) or before the execution of the mortgage conveyance, notwithstanding that the money be paid, (d) it will be sufficient to affect him with all the consequences of notice before payment. In the latter instance, because it was his own fault to pay the money before he got the conveyance ; and in the former, because he may go into equity, and have the money secured applied in discharge of the former incumbrance.

So every purchaser discovering an incumbrance may retain so much for it as remains in his hands. (e) But this, of course, cannot apply to a case where a mortgagee or purchaser agrees to take, subject to a prior charge. And, I apprehend, that if a mortgagee or purchaser should pay part of his money without notice of an intervening incumbrance, but should have such notice before payment of the residue, as to the part paid, he would have all the rights of an equitable mortgagee without notice ; and might, by taking in a prior mortgage, exclude the intervening incumbrancer.

In *Bentham v. Haincourt*, (f) it was held that if a mortgagee, after notice of a subsequent mortgage, joins with the mortgagor in a sale of the lands to a stranger, the money received by either for the purchase shall sink so much of the mortgage money. But the report of this case, as to this part of it, seems to be very imperfect. For, first, it does not appear whether the first mortgage comprized any more lands than the second. And, secondly, it does not state whether the purchaser, at the time of

(c) *Tourville v. Naish*, 3 P. Wms. 175. 10 Ves. 271.  
 307. *Hardingham v. Nicholls*, 3 (d) *Wigg v. Wigg*, 1 Atk. 384.  
 Atk. 304. *Fitzgerald v. Burk*, 2 *Fitzgerald v. Burk*, 2 Atk. 397.  
 Atk. 397. *Storey v. Lord Windsor*, 2 Atk. 630. *More v. May-* (e) 1 Ves. 88.  
*how*, 1 Cha. Ca. 34. S.C. 2 Freem. (f) 1 Eq. Ca. Abr. 320. pl. 2.  
 S.C. Cha. Prec. 30.



his purchase, had notice of the second mortgage. For, if the first mortgage comprized no more lands than the second, and the purchaser bought with notice of the second, there would be no occasion for holding that the money paid for the purchase must necessarily sink so much of the first mortgage; because if the lands remaining in the first mortgagee proved insufficient to pay both mortgages, the second mortgagee might resort for payment to the lands in the hands of the purchaser. But if the first mortgage comprized more lands than the second, and the first mortgagee joined in selling any part of the lands comprized in his security, which were not also comprized in the second mortgage, the conduct of the first mortgagee would be fraudulent, as against the second, so far as it tended to diminish the security of the second by leaving a smaller fund to answer the first; and would therefore justify the position that the purchase money must go to sink so much of the first mortgage. Wherefore, it seems to follow that, upon a purchase of lands subject to two mortgages, the purchaser and not the first mortgagee may become answerable for the misapplication of the purchase money; and that, therefore, the purchaser should see that the purchase money is actually paid to the first mortgagee.

It has been thought that if there are two mortgagees, and the first in point of charge buy the inheritance, he lets in the other on the estate discharged of the prior mortgage: (*g*) but this opinion is not only contrary to the principle of *Kennedy v. Daly*, (*h*) but is in direct opposition to the third point in *Mocatta v. Murgatroyd*, (*i*) wherein it was laid down, “that though A., the mortgagee, when there were subsequent mortgages, took afterwards a release of the

(*g*) Sugd. on Vend. and Pur. 352.  
note, 4th edit.

(*h*) 1 Scho. and Lef. 355.

(*i*) 1 P. Wms. 395.

ultimate equity of redemption, yet this did not oblige the said A., who had taken a release of such equity, to pay the intermediate mortgages, provided he would still waive the release made to him of the equity."

If there be a first and second mortgage, and a third mortgagee has notice of the second mortgage, but not of the first, he must still take subject to both mortgages; for taking it subject to the second, he must take it subject to every thing that was subject to. (*k*) But if the first and second mortgages be both equitable securities, and the legal estate is afterwards conveyed to a third mortgagee, who has notice of the second mortgage, but not of the first, the third mortgagee will hold subject to the second only, and not to the first. (*l*)

And in such case if the estate, instead of being mortgaged a third time, were sold out and out to a purchaser who had notice of the second mortgage, but not of the first, the purchaser would be a trustee of the purchase money, in the first place for the second mortgagee, and when the whole of his debt was satisfied, then for the first. (*m*) In like manner where a mortgagee purchased the equity of redemption; but at the time of such purchase he had notice of two judgments, subsequent to his mortgage, but, previous to his purchase; he was decreed to pay them off; but as to a judgment creditor, still prior to either of the two, of whose debts he had notice; he had no relief, because he gave no notice in time of his judgment. (*n*)

Notice may be given either directly to the mortgagee himself, or indirectly through one employed by him, which

(*k*) *Pomfret v. Windsor*, 2 Ves. 472. 486.

(*l*) *Ingram v. Pelham*, Amb. 153.

(*m*) *Ingram v. Pelham*, Amb. 153. and in margin there.

(*n*) *Greswold v. Marsham*, 2 Cha. Ca. 170. cited in Amb. 156. where the order of the judgment creditors is stated.

will be equally binding upon him. Therefore notice to the counsel, attorney, or agent of the mortgagee, is considered notice to him. (o) And the rule will be the same, although such counsel, attorney, or agent, be employed in part only, and not throughout the transaction; (p) or be employed both for the mortgagor and mortgagee; (q) or be concerned in two capacities, as counsel, attorney, or agent for the mortgagee, and also for himself as mortgagor. (r) And a person, who has notice of an incumbrance, cannot avoid the effect of such notice by procuring a third person to become the purchaser, and taking a conveyance in his name, though such third person might have had no notice. (s)

This notice, however, to the counsel, attorney, or agent, (t) or to the party himself, (u) must be given or obtained in the same transaction, or else it will not be binding; for it is not to be presumed that they will carry in their minds all the business they have ever been con-

(o) *Merry or Hollowell v. Abney*, 1 Cha. Ca. 38. S. C. 2 Freem. 151. S. C. Nels. C. R. 59. *Newstead v. Searles*, 1 Atk. 265. *Le Neve v. Le Neve*, 3 Atk. 646. S. C. 1 Ves. 64. S. C. Amb. 436. Gilb. 8. *Ashley v. Baillie*, 2 Ves. 370. *Maddox v. Maddox*, 1 Ves. 61.

(p) *Bury v. Bury*, cited Sugd. on Vend. and Pur. 613. 4th edit. reported in the same book. Appendix, pa. 72. See also *Vane v. Lord Barnard*, Gilb. 6. where the question was made, but not decided.

(q) *Toulmin v. Steere*, 3 Mer. 210. *Le Neve v. Le Neve*, *ubi supra*.

(r) *Sheldon v. Cox*, Amb. 624. S. C. 2 Eden 224.

(s) *Jennings v. Moore*, 2 Vern. 609. affirmed in D. P. *nomine*. *Blenkarne v. Jennens*, 1 Bro. P. C. 244. *Coote v. Mammon*, 2 Bro. P. C. 596. fol. ed.

(t) *Preston v. Tubin*, 1 Vern. 287. *Fitzgerald v. Lord Fauconberge*, Fitzg. 211. cited 2 Ves. 369. *Warrick v. Warrick*, 3 Atk. 291. *Worsley v. Earl of Scarborough*, 3 Atk. 392. *Lowther v. Carlton*, 2 Atk. 242. *Hine v. Dodd*, 2 Atk. 276. *Steed v. Whitaker*, Barnard. Ch. R. 220. *Ashlie v. Baillie*, 2 Ves. 368. *Mountford v. Scott*, 3 Mad. 34. 13 Ves. 120.

(u) *Hamilton v. Royse*, 2 Scho. and Lef. 315. 327.

cerned in, or will look to more than the business immediately before them.

But in certain cases notice to the agent, or to the party himself, though obtained in another transaction, has been held to be binding. As where Sir E. H. mortgaged to M. and his heirs for securing 3000*l.* and interest, and afterwards upon an advance of 2,800*l.* by G. declared that after the 3000*l.* and interest paid the estate should be a security to G. for the 2,800*l.* and interest: but M. was no party to this deed. Afterward H. lent Sir E. 200*l.*, and obtained a deed from Sir E. as well as M., that after M. was paid the estate should stand charged with her 400*l.*, and in like manner for C. and several other persons. Upon a question whether the mortgage to G. should be paid first after that to M., being the next in point of time, or whether H. or C. should be preferred because they had got a declaration not only from Sir E., but also from M. who by that means had become trustee for them. It was decreed at the Rolls, and afterwards affirmed by the Lord Keeper Cowper, that the mortgage to G. should be paid next after that to M. and then H. and so the rest, as they stood in order of time, because all the securities were transacted at the shop of W. and E. the scriveners, who were witnesses, and engrossed all the securities, and were in nature of agents to all the several lenders; and notice to the agent is good notice to the party, and consequently they that lend last must come last, having notice of what was before lent. (x)

So where A., being a copyholder in fee, mortgaged by surrender to B., who was admitted by J. S., being steward of the manor; afterwards A. mortgaged his said copyhold to D., who was also admitted by the same steward;

(x) *Brotherton v. Hatt*, 2 Vern. 574. cited in *Le Neve v. Le Neve*, 3 Atk. 655. where Lord Hardwicke says Hatt, in this case, was imposed upon; which repels all presumption of the agent's having forgotten.

and afterwards the same copyhold was mortgaged to the steward himself, who took in the first mortgage: and Lord Chancellor King decreed that J. S., the steward by the purchase in of the first incumbrance, should not postpone the middle mortgagee; but that the middle mortgagee should be satisfied in order of priority after the first mortgage discharged, since J. S. must have had notice of this mesne mortgage at the time of the mortgage made to him, he being steward of the manor when D. was admitted. (*y*)

So where Sir W. B. by indentures of the 7th and 8th of August, 1732, granted a rent charge of 100*l.* per annum to M. and his heirs. On the 9th of the same month he granted a rent charge of 100*l.* per annum to G.; and covenanted that the estate was free from incumbrances, except the rent charge to M. Afterwards in 1735 Sir W. B., in consideration of G. having extinguished the rent charge of the 9th of August, 1732, granted him a new rent charge, which afterwards became vested in J., who got an assignment of a prior term. And per Lord Hardwicke, Chancellor. "In 1735, the new rent charge was granted to G. on no other consideration, but the extinguishment of the former. It is clear G. had notice; and, being once affected, is always so." (*z*)

These cases seem to be taken out of the general rule on the ground of fraud, since it cannot be supposed that W. and E., the scrivener in the first instance, or that J. S., the steward in the second instance, could be capable of such gross forgetfulness, as not to recollect the prior transactions in which they were so personally and immediately concerned. And as to the last, the grant to G. in 1735, having a reference to a former annuity, would have led G. or any assignee claiming under him, to the deed of the 9th

(*y*) *Brothers v. Bence*, Fitzg. 118. (*z*) *Mertins v. Jolliffe*, Ambli. 311.

of August, which contained an exception of the annuity to M., which is, of itself, a sufficient notice.

Notice, in its nature, is either positive or constructive. Positive notice is the actual and positive communication of a fact. Constructive notice is no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted. Thus, if a mortgagee has a deed put into his hands which recites another deed which shews a title in some other person, the Court will presume him to have notice, and will not permit any evidence to disprove it; (a) or, as it has been elsewhere expressed, where a "purchaser cannot make out a title, but by a deed, which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognizant of it, for it is *crassa negligentia* that he sought not after it." (b) As where a lease was mortgaged which recited the surrender of a former lease, which was in consideration of the surrender of a former lease in which the plaintiff's title appeared, the mortgagee was held to have had notice of it. (c) So a general notice, that there are leases of the land subsisting, is notice of all their contents, and will bind a purchaser or mortgagee. (d) And so of any other deed (e) So notice that the estate is in the possession of a tenant is notice of all the claim which he may have in the estate, whether

(a) *Plumb v. Fluit*, 2 Anstr. 438.

(b) *Moore v. Bennett*, 2 Cha. Ca. 246.

(c) *Coppin v. Fernyhough*, 2 Bro. C. C. 291. See also *Bisco v. Earl Banbury*, 1 Cha. Ca. 287.—*Ferrars v. Cherry*, 2 Vern. 383. As to which see *Senhouse v. Earle*, Amb. 285. 289. *Drapers' Company v. Yardley*, 2 Vern. 662. *Mertins v. Jolliffe*, Amb. 311. New-

*man v. Kent*, 1 Mer. 240. *Hamilton v. Royse*, 2 Scho. and Lef. 315. 327. *Palmer v. Wheeler*, 2 Ball & Beat. 18.

(d) *Tanner v. Florence*, 1 Cha. Ca. 259. *Taylor v. Stibbert*, 2 Ves. jun. 437. *Hall v. Smith*, 14 Ves. 426.

(e) *Dunch v. Kent*, 1 Vern. 319. *Hamilton v. Royse*, 2 Scho. and Lef. 315.

under the original lease, (*f*) or any contract posterior ; as if the tenant has agreed to purchase the timber on the estate, (*g*) or to purchase the estate itself, (*h*) notice of his possession is notice of such contract. Notice that a particular person has a judgment or warrant of attorney is notice of a mortgage made to him, because it puts the purchaser or subsequent mortgagee upon further inquiry. (*i*) Notice that a particular person has a mortgage on an estate about to be sold or mortgaged is notice also of another mortgage of another estate made to the same person. (*k*) Notice of the deposit of title deeds, or of their being in the hands of a third person, is notice of such third person's claim. (*l*) But the simple fact of the title deeds not being delivered over is not notice of the claim of a prior mortgagee, with whom they were deposited as a security ; particularly where the second mortgage was made in haste, and there was no neglect on the part of the second mortgagee to call for the deeds. (*m*) A recital in a deed that so much is the full value of an estate, it being in fact worth a great deal more, if free from incumbrances, has been said to be notice of an incumbrance upon it. (*n*) If the mortgagor be a man of fortune, and married, and the mortgagee has notice of the marriage, here notice of the marriage was construed by my Lord Nottingham as notice of a jointure made upon the wife, because marriages between persons of fortune are seldom made without settling the wife in the land ; and such constructive

(*f*) 2 Ves. jun. 410. 13 Ves.  
121.

(*g*) Allen v. Anthony, 1 Mer.  
282.

(*h*) Daniels v. Davison, 16 Ves.  
249. S. C. 17 Ves. 433. Crofton  
v. Ormsby, 2 Scho. and Lef. 583.

(*i*) Taylor v. Baker, 5 Price 306.  
S. C. Dan. 71.

(*k*) Ex parte Cartor, Amb. 733.

(*l*) Birch v. Ellames, 2 Anstr.  
427. Gilb. For. Rom. 230.

(*m*) Plumb v. Fluit, 2 Anstr.  
432.

(*n*) Morret v. Paske, 2 Atk. 52.  
Thomas v. Pledwell, 7 Vin. Abr.  
53. pl. 5. S. C. 2 Eq. Ca. Abr.  
684. pl. 7.

notice he held to be sufficient. (*o*) Notice that one is dealing for an estate held under a forfeited mortgage is notice of the mortgagor's right to redeem; though he thought it irredeemable, if the equity of redemption subsists; and whoever takes an estate held under such a title must run the risk, whether it is redeemable or not. (*p*) The registration of deeds and incumbrances is not of itself any notice, as we have already seen. (*q*) But if a mortgagee or purchaser has notice of an incumbrance affecting an estate in the register counties, he will be bound by it, though not duly registered. (*r*) The like may be said of judgments.

The record of a judgment is not of itself any notice to a person dealing for an estate. (*s*) But, if he have notice of the judgment from some other cause independent of the record, his conscience will be affected, and he will be bound by the judgment. (*t*) And this, though the subject of his contract be an equity of redemption, (*u*) which cannot be taken in execution under the statute of frauds, (*v*) or the judgment be not docketed, (*w*) or not properly docketed according to the provisions of the 4 and 5 W. and M. c. 20. (*x*)

(*o*) *Doyley v. Perfal*, Gilb. Lex. Præt. 261. 282. This point is not mentioned in the reports of the same case in 1 Eq. Ca. Ab. 57. 1 Cha. Ca. 225. 2 Freem. 138. See also Treat. on Equity, Book II. Ch. VI. Sec. 3.

(*p*) *Hansard v. Hardy*, 18 Ves. 462. See also *Harrison v. Forth*, Cha. Prec. 51.

(*q*) *Anteunder Registry of Deeds*, and *Bedford v. Backhouse*, Wm. Kely. 5.

(*r*) 3 Atk. 652. 1 Ves. 66.

(*s*) *Hine v. Dodd*, 2 Atk. 275. *Greswold v. Marsham*, 2 Cha. Ca. 170. 1 Cha. Ca. 36, 37.

(*t*) *Greswold v. Marsham*, 2 Cha. Ca. 170. *Thomas v. Pledwell*, 7 Vin. Abr. 53. pl. 5. S. C. 2 Eq. Ca. Abr. 684. pl. 7.

(*u*) *Greswold v. Marsham*, 2 Cha. Ca. 170. S. C. Amb. 156. cited.

(*v*) *Lyster v. Dolland*, 1 Ves. jun. 431. S. C. 3 Bro. C. C. 478. *Burden v. Kennedy*, 3 Atk. 739. *Scott v. Scholey*, 8 East. 467. *Metcalf v. Scholey*, 2 New Rep. 461.

(*w*) *Davis v. Earl of Strathmore*, 16 Ves. 419.

(*x*) *Thomas v. Pledwell*, 7 Vin. Abr. 53. pl. 5. S. C. 2 Eq. Ca. Ab. 684.



In a case before Lord Kenyon, at *Nisi Prius*, his Lordship said, “that an abstract ought to mention every incumbrance whatever affecting an estate upon which any security was about to be placed; and should, therefore, contain an account of every judgment by which the estate was affected. That the abstract, therefore, in the principal case was objectionable in that respect; nor was the objection removed by the offer to have satisfaction acknowledged under a power of attorney, as that was liable to objection; and it had been decided by Lord Hardwicke that a party was not bound to accept of any conveyance or any agreement executed under such circumstance. That, with respect to the searching for judgments, the conduct of the plaintiff’s attorney had been perfectly proper; for as it was absolutely necessary to search for judgments immediately before the conveyances were executed, lest some judgments should have been entered up during the treaty, that he had assigned a very proper reason for not having done so at first, namely, the plaintiff’s assertion that no judgment did in fact subsist charging the estate, except one for 1000*l.* before mentioned, and as it saved the expence of a double search for judgments.” And, accordingly, his Lordship ruled that the plaintiff, having discovered another judgment for 5000*l.* besides that for 1000*l.* above mentioned, and thereupon declined to proceed in advancing his money, was entitled to recover the expences of the conveyance with interest, from the time the plaintiff had prepared it to the time that the treaty was at an end. (*y*)

It is as yet an undetermined question how far a person purchasing a copyhold estate must be presumed to have notice of every thing on the court rolls relative to it. But if there is a reference in a deed to an admittance, it is direct notice of that admittance, and consequently of the

surrender upon which it proceeds, and to which it refers. (z)

If a receiver-general of taxes, having notice that a collector of taxes under him is insolvent and indebted to the crown, furnish him with money to pass his accounts with voucher for the receipt of the money, and take a mortgage from the collector by deposit of title deeds, his mortgage is void as against the crown on account of the fraudulent purpose; for it is an unjustifiable endeavour to sustain the credit of a sinking man who is thereby enabled to involve the parish more than if an extent had at first issued. (a) Nay, it was said, that the collector's situation rendered it very probable that he might be indebted to the crown: it was then the business of the receiver-general to ascertain whether he were so indebted, even if he had not really known the fact; and on that ground alone the deposit, as an equitable mortgage, ought to be vacated. (b) But, if the transaction be free from fraud, a mortgage by deposit of deeds, taken from a simple contract debtor of the crown, is good against the crown; and, if the property of the simple contract debtor should be afterwards taken and sold under an extent, the money arising from the sale would be applied in the first place in discharging the debt to the mortgagee, who would be also entitled to his costs. (c) A simple contract debtor to the crown is one who is neither a debtor of record to the crown, nor so connected with the crown as to come under any denomination of persons enumerated in the statute of the 13th of Elizabeth, c. 4. (d) And it has been decided that a collector of taxes is only a simple contract debtor to the crown, though he is subject to the crown process; for as to that, he is subject to no more than

(z) *Hansard v. Hardy*, 18 Ves.  
462.

(a) *Broughton v. Davis*, 1 Price  
216.

(b) 1 Price 223.

(c) *Casberd v. Attorney-General*,

6 Price 411.

(d) 6 Price 475, 476.

every one is, who has, *quocunque modo*, money of the crown in his hands. (e) And as a mortgage by deposit from a simple contract debtor to the crown shall be good; much more shall a mortgage or purchase of the legal estate, made to a person having no notice of the mortgagor or vendor, being a simple contract debtor to the crown, and without fraud or covin, be good; and shall stand good against the crown, although the simple contract debt were actually incurred before his mortgage or conveyance made. (f)

Where a father, having a power to appoint an estate among children, makes an exclusive appointment to one child in order to enable that child to join with him in letting in a debt of the father's upon the estate, the appointment is considered fraudulent; and, if the mortgagee has notice of the fraudulent appointment, his security will be liable to be set aside. (g) But where upon an abstract of title there appeared a deed by which a father, under a power to appoint to children, had made an exclusive appointment of the fee to his eldest son, after having contracted to sell; and then the father and his wife and the eldest son joined in conveying to the purchaser; upon an objection taken to the title by a subsequent purchaser, on account of the suspicion arising from this transaction, Lord Eldon held the title good; for that the money had been paid to the father, mother, and son, to be dealt with according to their respective rights, that is, according to their rights in the land; and it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest. And the purchase money upon the face of the instruments appearing to have been paid to the three, his Lordship said, that "in law and

(e) 6 Price 475, 476. See also the King v. Smith, Wightw. 34.; and the cases there cited. Brassey v. Dawson, 2 Stra. 978.

(f) The King v. Smith, Wight. 34.  
(g) Palmer v. Wheeler, 2 Ball and Beat. 18. See also 1 Cas. and Op. 34.

equity that would have been a payment to them according to the interests they had in the estate; and the purchaser would be safe, as the money got home to the three persons entitled; and how they disposed of it afterwards, as to their respective interests, was not of any importance to him.” (*h*)

If a mortgagee has notice that the mortgagor holds the property to be mortgaged as a trustee, whether the trust arises by express words, (*i*) or by implication of equity, (*k*) he will be liable to the trust in the same manner as the mortgagor was of whom he took his mortgage. And his being a mortgagee for a valuable consideration will not avail him for having notice of the trust: it is his own fault to throw away his money voluntarily. But if a mortgagee has no notice of the trust at the time of his mortgage, and comes in for a valuable consideration, his security will be effectual; (*l*) and the remedy of the persons injured by the breach of trust will be against the mortgagor. (*m*) But if the mortgagee claims only as a volunteer, he must make good the trust; though, at the time of the mortgage, he had no notice. (*n*) Yet, in this latter case, if the mortgagor has any beneficial interest in the property mortgaged, the mortgagee will be entitled to his security to the extent of this interest. (*o*)

If a term be assigned upon trust to attend the inheritance as limited or settled by such a deed, or to protect the

(*h*) *M'Queen v. Farquhar*, 11 Ves. 467.

(*i*) *Durnford v. Lane*, 1 Bro. C. C. 106. *Mansell v. Mansell*, 2 P. Wms. 678. S. C. Cas. temp. Talb. 252. *Pye v. George*, 1 P. Wms. 128. S. C. *ubi post.* *Garth v. Cotton*, 1 Dick. 183. 199.

(*k*) *Eyre v. Dolphin*, 2 Ball and Beat. 290.

(*l*) 1 P. Wms. 278, 279. *Digby v. Morgan*, 1 Cha. Rep. 244. 1 Ves. 216.

(*m*) 2 P. Wms. 681.

(*n*) *Pye v. George*, 1 P. Wms. 128. S. C. 2 Salk. 680. Cha. Prec. 308. 1 Bro. P. C. 359.

(*o*) *Durnford v. Lane*, 1 Bro. C. C. 106.

uses of such a settlement, it will be notice to a subsequent mortgagee or purchaser of the deed or settlement, and consequently of all the uses of it: but if a term be assigned to attend, or to protect the inheritance generally, it is notice of nothing, but that there is an inheritance to be protected, and that the term is attendant. And it does by no means imply that the inheritance is settled or bound by special limitations; for a satisfied term is as often assigned to attend an inheritance in fee-simple or fee-tail, as an estate carved out by particular uses and limitations. It therefore gives notice to a purchaser of nothing but what he had notice of by the deeds making out the title to the fee. In this respect it is just the same as where the trust to attend the inheritance is constructive or implied. (p)

Notice of a voluntary conveyance, however, will not affect a mortgagee; for if a man should make a voluntary settlement, and then mortgage to one for a valuable consideration, though with notice of the prior voluntary settlement, and by an equitable security only, the voluntary settlement would be considered void as against the mortgagee, under the statute of the 27 Eliz. c. 4. (q) But no person can be advised to advance money upon property which has been the subject of a voluntary conveyance, without being satisfied that the claimants under the voluntary deed have not assigned over their interest in the land to a purchaser for valuable consideration. For though a voluntary settlement is considered fraudulent, as against the volunteers, in favour of a purchaser claiming from the settlor for a valuable consideration; yet it is held that the effect of the statute will be taken away by the

(p) *Willoughby v. Willoughby*, East. 59. *Leash v. Dean*, 1 Cha. 1 Term Rep. 769. Rep. 146.; and see cases on this

(q) *Gardiner v. Painter*, Sel. subject, cited ante, 104, 105. Cha. Ca. 65. *Doe v. Manning*, 9

subject of the voluntary settlement coming into the hands of a purchaser from the volunteers for valuable consideration and *bonâ fide*. (r) Thus, if a man make a conveyance to his son, and the son sells for valuable consideration, and after the father sells for valuable consideration, the purchaser from the son shall prevail, because he had purchased for consideration, without notice of the father's intention to sell afterwards for value; and therefore, as he comes in with a good conscience, and for value, he shall hold against the purchaser from the father. But if the purchaser from the son comes in by a defective conveyance, and the purchaser from the father comes in by a sufficient conveyance, without notice of the sale by the son, he shall hold it against the vendee of the son, because both are equal in equity; and then he who has the legal estate, of course, prevails. (s)

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debt expressed in the deed, is good, as against the grantor and his heirs, but void, as against a purchaser. (t) So if a man make a conveyance to another, in trust, to pay all his debts mentioned in a schedule, and all other his debts; as to all the debts besides those mentioned in the schedule such conveyance is fraudulent, as against a purchaser. (u) But then, in order to entitle a purchaser to set aside a deed made for payment of debts as against all the creditors, if none be parties, or as against such whose debts are not scheduled, or as against such as are not parties, if some only be parties, it is necessary that the purchaser should have been a purchaser for valuable consideration, and

(r) Andrew Newport's case, Rep. temp. Holt. 477. S. C. Skin. 423. Prodgers v. Langham, 1 Sid. 133. Kirk v. Clark, Cha. Prec. 275.

(s) Gilb. For. Rom. 222, 223.

(t) Leech v. Leech, 1 Cha. Ca. 249.

(u) Case cited in Langton v. Ashley, Nels. Cha. Rep. 126.

without notice of the trust to pay debts. For if he have notice, he cannot be relieved. (x)

So notice of a deed or will, vesting property in trustees for the payment of debts, will prevent a mortgagee, who is also a simple-contract creditor, from taking a mortgage from the trustees, thereby to enable himself to tack his simple-contract debt to his old debt, by mortgage, to the prejudice of the other creditors: but as to his simple-contract debt, he must come in *pari passu* with the rest of the creditors. (y)

If a creditor obtain a mortgage from a debtor in solvent circumstances, with notice of an intended deed of composition, his security would be considered fraudulent as against the creditors under that deed; yet if the composition deed goes off, and the debtor four months afterwards becomes bankrupt upon an act not contemplated at the time, the security will become effectual as against the assignees. (z)

A security given by a debtor, who is a trader within the bankrupt-laws, in order to give a particular creditor an undue preference in the payment of his debt, and in contemplation of an act of bankruptcy, is fraudulent as against the general creditors, and therefore void. (a)

But then, in order to constitute it fraudulent as against the general creditors, the security given by the debtor to a particular creditor must be a voluntary act on the part of the debtor. For, if a creditor be very urgent for the payment of his debt; (b) or if, in order to avoid a force either

(x) *Langton v. Tracy*, 2 Cha. 47. *Wilson v. Balfour*, 2 Camp. Rep. 16. S. C. Nels. Ch. Ca. 126. 579.

(y) *Ithell v. Bedne*, 1 Ves. 215. (b) *Smith v. Payne*, 6 Term Stephenson v. Hayward, Cha. Prec. Rep. 152. *Crosby v. Crouch*, 11 310. East. 256. *Bayley v. Ballard*, 1

(z) *Wheelright v. Jackson*, 5 Camp. 416. *Reed v. Ayton*, 1 Holt. Taunt. 109. 503. *Hartshorn v. Slodden*, 2 Bos.

(a) *Linton v. Bartlett*, 3 Wils. and Pul. 582.

civil or criminal, (c) a debtor be induced to give a special security to a particular creditor ; his security will be good.

But if the conveyance be to trustees, in the first place for satisfying an urgent creditor, and then for securing the claims of some relatives, in order to give them an undue preference, and in contemplation of an act of bankruptcy, the security will be considered good as to the urgent creditor, but void so far as it seeks to prefer the relatives. (d)

Where a debtor, being pressed by a creditor for some security, gave him a bill of sale of some goods which, it appeared, comprized all his property, and immediately left his home and became bankrupt, it was held a voluntary preference ; for the debtor did it in contemplation of bankruptcy, (indeed, the very deed itself was an act of bankruptcy,) and not in order to redeem himself from any present difficulty by doing the act ; which is the motive for such an act, when really done under the pressure of a threat. (e)

If a mortgagee has got in a prior legal estate, it will protect him as against a commission of bankruptcy, or an act of bankruptcy committed by the mortgagor before the making of the mortgage. But if the mortgagee has actual notice of the commission, or of the act of bankruptcy, his legal estate will not protect him. (f)

Thus in *Collet v. De Gols and Ward*, (g) where Tyssen in 1722 committed an act of bankruptcy, and in 1725 released his equity of redemption to Ward ; in 1726, a commission of bankruptcy having issued against Tyssen, De Gols, the assignee under the commission, brought his bill

(c) *De Tastet v. Carroll*, 1 Stark. East. 544.  
88.

(d) *Morgan v. Horseman*, 3 Taunt. 119. pl. 2. and 123. 2 Eq. Ca. Abr.  
241. 119.

(e) *Thornton v. Hargreaves*, 7 (g) Cas. temp. Talb. 65.

(f) *Read v. Ward*, 7 Vin. Abr.



to set aside the release in 1725 to Ward. To which Ward pleaded himself a purchaser without notice, and relied upon a legal estate created previous to the act of bankruptcy. The plaintiff relied upon the statute of the 21 Jac. I. c. 19., which makes void all conveyances executed after the act of bankruptcy; and vests the estate in the assignee, as from the time of the act of bankruptcy, provided a commission be sued out within five years afterwards. Lord Talbot, in delivering judgment, said,—“Here the legal estate is in Ward; and the question is, whether in a court of equity it shall be taken away without Ward’s being paid all the money he advanced? Though the rule be the same here as at law, upon construction of statutes; yet, where an act is to be carried into execution here, there are certain rules to be observed which will bind equally in case of an act of Parliament as of the common law. One of those rules is, that a purchaser for a valuable consideration, without notice, having as good title to equity as any other person, this Court will never take any advantage from him; and, consequently, will not grant a discovery against him of the only equity he has to defend himself by, which, if he should be obliged to discover, the other party would immediately take advantage of. And there, certainly, may be cases where a purchaser for a valuable consideration, without notice of an act of bankruptcy, shall not be obliged in this court to discover any thing (whether incumbrances that he has got in or any other thing,) but all advantage shall be left him to defend himself. Suppose two purchasers without notice, and the second by chance gets hold of an old term, he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration as himself. I do not, therefore, think a purchaser for a valuable consideration, without notice of the bankruptcy, to be relieved against in this court, within 21 Jac. I. The

case of *Hitchcock v. Sedgwick* (*h*) is very different from this ; for a commission is a public act of which all are bound to take notice : but an act of bankruptcy may be so secret as to be impossible to be known. And therefore, I think, that Ward having the legal estate in him shall by that be protected for so much as he really and *bonâ fide* paid after Tyssen's bankruptcy ; and therefore directed an issue upon the point of notice, to try whether Ward had notice of Tyssen's bankruptcy, and when. And as to the other part of the estate, which, though not in Ward himself, was in others who were trustees for Ward, that must be considered as one and the same thing."

To the like effect Lord Mansfield expresses himself in *Foxcroft v. Devonshire*, (*i*) and in *Hargrave v. Le Breton*. (*k*) It is true that in *ex parte Herbert*, (*l*) before Lord Erskine, his Lordship denies the case of *Collet v. De Gols* to be law, relying upon some expressions of Lords Redesdale and Eldon against that case. In the case *ex parte Herbert* it seems that the latter security was taken on the 1st of April, 1805, and the commission of bankruptcy issued on the 31st of May following. The estate was sold ; and the mortgagee gave up his deeds to the assignees upon an agreement that his right to tack should be determined by a petition to be presented for that purpose. The petition relied upon acts of bankruptcy committed in January, 1805, and charged that the mortgagee had notice of the insolvency of the mortgagor at the time of taking his security. Lord Erskine decreed that the assignees might redeem paying what was due upon the first security only. But then it seems that his Lordship laid some stress upon the circumstance that the mortgagee consented to disclose the weakness of his title, and had not

(*h*) 2 Vern. 156. The decree in *Vernon*, as here noticed, reversed in D. P. See post.

(*i*) 2 Burr. 938.

(*k*) 4 Burr. 2425.

(*l*) 18 Ves. 183.

pleaded a purchase for valuable consideration without notice.

Lord Erskine's chief reliance, however, was upon the opinions attributed to Lord Redesdale in *Latouch v. Lord Dunsany*, (*m*) and to Lord Eldon in *ex parte Knott*. (*n*) In the former, where the case of *Collet v. De Gols* was incidentally mentioned, Lord Redesdale is said to have observed that it is now the constant practice for the assignees to compel a redemption on payment only of what was advanced before the bankruptcy. He did not, however, express any opinion on the point. (*o*) And upon the latter case it seems difficult to discover how Lord Eldon's judgment can be construed to have impugned the authority of *Collet v. De Gols*. For, first, his Lordship notices that case without making any particular comment on it; and, secondly, he expressly declares that, as to what was insisted that the commission has the same effect as a decree, "That is not so. The commission is no judgment for creditors. It is only a conveyance for the security of creditors: and the utmost that can be stated from all these cases, is, that the question is to be agitated between persons having securities, and the assignees, as persons, having securities, or as purchasers for valuable consideration." (*p*)

Besides, as has been observed by Mr. Sugden, (*q*) it escaped observation in the case *ex parte Herbert*, that it had been decided by the House of Lords that if a mortgagee has the legal estate, he may tack subsequent advances, though a commission of bankruptcy had actually issued against the mortgagor. And if a commission is not of itself notice sufficient to prevent tacking, much less shall an act of bankruptcy be so. For the case of *Hitch-*

(*m*) 1 Scho. and Lef. 137.

(*p*) 11 Ves. 619.

(*n*) 11 Ves. 609.

(*q*) Treat. on Vend. and Pur.

(*o*) 1 Scho. and Lef. 152, 153.

622, 623, 4th edit.

cock *v.* Sedgwick, which Lord Talbot distinguishes from the case of Collet *v.* De Gols, coming on before the Lords, the Lords reversed the decree against Sedgwick, and ordered him to be paid the money advanced subsequent to the commission. (r) Besides, even in a court of law, Lord Ellenborough observed that the gazetting of a commission of bankruptcy “is a circumstance from whence a jury may presume notice, but it is not in itself actual notice,”—which he could never have said if the commission, without the gazetting, were to be considered as notice. (s)

And if a prior legal estate shall protect a purchaser or mortgagee, as against the assignees in bankruptcy, claiming under the statute of the 21 Jac. 1. c. 19.; by a parity of reason it would protect as against the assignees claiming under the 46 Geo. 3. c. 135. (t)

*Lis pendens* is of itself sufficient notice to a purchaser, or to a mortgagee who becomes such for the first time after the suit commenced; for, as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there; and it is to prevent a greater mischief, that would arise by people purchasing a right under litigation, and then in contest. (u) But, in order to make *lis pendens* of itself a binding notice, it is necessary, 1st. That the suit should be real, and not collusive; (v) 2dly, That it should be in full prosecution; (w) and, 3dly, That the question should relate to the estate,

(r) 2 Vern. 156. reversed in D.P. See Journals of the House of Lords, Vol. 14. p. 601. Sugd. on Vend. and Pur. 619. 4th edit.

(s) 7 East. 161.

(t) Sugd. on Vend. and Pur. 556, 4th edit. 582, 5th edit.

(u) Worsley *v.* Earl of Scarborough, 3 Atk. 392. Sorrel *v.* Carpenter, 2 P. Wms. 482. Garth *v.*

Ward, 2 Atk. 174. Bishop of Winchester *v.* Paine, 11 Ves. 194.

(v) Culpepper *v.* Aston, 2 Cha. Ca. 116.

(w) Preston *v.* Tubbin, 1 Vern. 286.: but see Bishop of Winchester *v.* Paine, 11 Ves. 194. Style *v.* Martin, 1 Cha. Ca. 150. and Sugd. on Vend. and Pur. 613, 614, 4th edit.

and not merely to money secured upon it. (x) But a bill to perpetuate the testimony of witnesses, and to establish a will is a sufficient *lis pendens*. (y) And if a person take a mortgage of the equity of redemption during a bill of foreclosure brought by a prior mortgagee, he will be bound by the decree, and the mortgagor's default in redeeming, though he were made no party to the suit. (a)

*Lis pendens*, however, will not prevent incumbrancers, who were such before the suit commenced, from taking in prior incumbrances, so as to enable themselves to tack their own mortgages, and thereby to exclude the intermediate incumbrancers; for it is the very pendency of the suit that frequently conveys notice to a subsequent mortgagee of the intermediate incumbrances, and shews the necessity of his getting in the prior legal incumbrance. (b) But a prior incumbrancer cannot, during *lis pendens*, take in a puny incumbrance, so as to exclude intermediate incumbrancers; for the rule of the Court, as to prior incumbrancers taking in a subsequent one, so as to tack it to the prior, is where he is a *bonâ fide* purchaser of the puny incumbrance without notice of the intermediate ones. (c)

A decree in Chancery differs from a *lis pendens*; for it is not implied notice to a purchaser after the cause ended. But a decree to account is not such a one as puts a conclusion to the matters in question; and is, therefore, such a suit as does affect people with notice of what is doing. (d)

(x) *Worsley v. Earl of Scarborough*, 3 Atk. 392.

(y) *Garth v. Ward*, 2 Atk. 174. S. C. *Nomine Garth v. Crawford*, Barnard. C. R. 450.

(a) *Bishop of Winchester v. Paine*, 11 Ves. 194.

(b) *Robinson v. Davison*, 1 Bro. C. C. 63. *Marsh v. Lee*, 2 Vent. 337. S. C. 1 Cha. Ca. 162. *Brace*

*v. Duchess of Marlborough*, 2 P. Wms. 491. *Hawkins v. Taylor*, 2 Vern. 29. *Turner v. Richmond*, 2 Vern. 81. *Belchier v. Renforth*, 6 Bro. P. C. 28. fol. ed. 11 Ves. 619.

(c) *Morrett v. Paske*, 2 Atk. 52. *Long v. Clopton*, 1 Vern. 464. Ante 288, 289.

(d) *Worsley v. Earl of Scarborough*, 3 Atk. 392.

And if a person have express notice of a decree, he will be bound by it, though he were no party to the suit. *(e)*

But as to incumbrancers and mortgagees a decree in Chancery has the greatest effect, both in preventing them from changing the order of payment from that in which they stood at the time of the decree, and in preventing subsequent incumbrancers from taking in prior incumbrances so as to enable themselves to tack their puny incumbrances to the prejudice of the intermediate ones. Thus, after a decree to account, and to settle the priorities of the incumbrances, a puisne incumbrancer cannot take in the first incumbrance so as to exclude the second, for the rights are to be considered as they stood at the time of the decree; and nothing would open a greater door for collusion and contrivance between the parties to exclude each other than such a liberty would. *(f)* So, after a decree to redeem, a mortgagee cannot take in incumbrances, and tack them to his mortgage. *(g)* And if an order be made upon motion, under the 7 Geo. 2. c. 20., a mortgagee cannot afterwards on motion have an order to discharge that decree, and insist upon tacking a bond debt to his mortgage. *(h)* Though a creditor be no party to the suit he cannot, after a decree to account and settle priorities, assign over his incumbrance to an incumbrancer, so as to give the assignee a right to attack the two securities together. *(i)* And where there has been a decree for creditors to come in, a mortgagee cannot tack a simple contract debt as against the executors of the mortgagor seeking a redemption. *(j)*

*(e)* Harvey v. Montague, 1 Vern. Rep. 171.

57. 122. S. C. 2 Cha. Ca. 180.

*(h)* Cadle v. Fowle, 1 Bro. C. C.

*(f)* Wortley v. Birkhead, 2 Ves. 515.

571. S. C. 3 Atk. 809. Bristol v.

*(i)* 2 Ves. 575.

Hungerford, 2 Vern. 525. 11 Ves. 619.

*(j)* Vanderzee v. Willis, 3 Bro. C. C. 21.

*(g)* Welden v. Rallison, 1 Cha.

The following important considerations, as connected with the point of notice, here present themselves:—

1st. In what cases an assignee, claiming under the original purchaser or mortgagee, or through various assignments from them, shall be allowed the benefit of want of notice in the original purchaser or mortgagee, in any of the intermediate assignees, or in himself. 2nd. How notice should be denied, or how a mortgage should be pleaded. And, 3rd. As to a mortgagee denying the discovery of his title deeds.

1st. It is held that if one purchases or takes a mortgage of an estate, without notice of an incumbrance, a subsequent purchaser or assignee from him will be safe, though at the time of his purchase or assignment he may have notice. (*k*) And the reason is to prevent a stagnation of property; for, if the rule were otherwise, an innocent purchaser or mortgagee might be prevented from selling. In practice, however, it is considered that since the want of notice in the original purchaser or mortgagee is a negative, and will not admit of affirmative proof, a title so circumstanced cannot be recommended.

If a mortgage be assigned over to A., and then again from A. to B., the last assignee, may take advantage of the want of notice in A. Thus if C. purchases an estate with notice of an incumbrance, or that it is redeemable, (*l*) and then sells it to A., who has no notice, and A. afterwards sells it to B., who has notice, B. will be safe under the want of notice to A. (*m*)

(*k*) *Lowther v. Carlton*, 2 Atk. Ca. Abr. 331. pl. 6.  
242. S. C. Barn. Cha. Rep. 358. (*l*) As to this see *Hansard v.*  
S. C. Cas. Temp. Talb. 187. *Brand-* Hardy, 18 Ves. 462, ante p. 372.  
*lyn v. Ord*, 1 Atk. 571. 4 Bro. (*m*) *Harrison v. Forth*, Cha.  
C. C. 136. Amb. 313. *Harrison* Prec. 51. S. C. 1 Eq. Ca. Abr. 331.  
*v. Forth*, Cha. Prec. 51. S. C. 1 Eq. pl. 6.

So, where there have been a variety of assignments of a mortgage, the last assignee may take advantage of the want of notice in any of the intermediate assignees. Therefore, where a bill was filed to discover whether the defendant, who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title deed, by which this appeared, was in the defendant's hands, the defendant pleaded that he was assignee of the mortgage for valuable consideration, and through many assignments from persons who had no notice. It was argued that this plea was not good, for it should have been stated whether the defendant personally had notice. But his honour allowed the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice; for whether he had or had not was immaterial, if those through whom he claimed had not; he having a right to avail himself of their being purchasers without notice. (n)

Hence it follows that where one purchases, or takes a mortgage, or an assignment of a mortgage, *bonâ fide* and without notice of an incumbrance, from a person who had notice, such purchaser, mortgagee, or assignee, will not be affected by the circumstance that the person, under whom he claims, had notice. (o)

But in all these cases, in order to give a person the full benefit of want of notice, either in himself, a previous assignee, or the original purchaser or mortgagee, it is necessary that he should have the legal estate: for, otherwise, equity will not interfere in his behalf as against other *bonâ fide* purchasers or incumbrancers. (p)

To the first of the above rules there is one exception, which is, in the case of a purchase of lands, given to some

(n) Sweet v. Southcote, 2 Bro. 384. Mertins v. Jolliffe, Amb. C. C. 66. S. C. 2 Dick. 671. 313.

(o) Ferrars v. Cherry, 2 Vern. (p) Amb, 313.



of the charitable uses specified in the 43 Eliz. c. 4. wherein it is held that if a purchaser of lands, given to charitable uses, though for consideration of money, hath legal notice of the use, and afterwards selleth the land to another for money, who hath no notice of the use: this second purchaser shall hold the land chargeable with the charitable use. But if the first purchaser had no notice of the use, then is the land discharged of the charitable use. And if he afterwards sell it to another for money that hath notice of the use, yet he shall not hold it subject to the charitable use. (q)

OF PLEADING A MORTGAGE, AND DENYING NOTICE.

2nd, Want of notice is, as it were, the equitable reliance of a *bonâ fide* purchaser or mortgagee for valuable consideration against the claim of a person who has as much equity, whereby he throws himself on the justice of the Court, requiring to know whether he, the defendant, who has as much equity as the person seeking relief, is obliged, either by confession or discovery, to injure himself or assist the plaintiff. In which case, if it appears that the defendant is a *bonâ fide* purchaser or mortgagee for valuable consideration, a court of equity will assist the defendant by refusing to interfere on the behalf of the plaintiff. Wherefore a plea of a purchase or mortgage, without notice, is called a plea in bar. Such a plea must aver the purchase and consideration, and deny notice.

And first, as to the purchase, it must aver that the person who conveyed or mortgaged to the defendant was seized in fee, or pretended to be seized at the time that he executed the purchase or mortgage deed. (r) And if the conveyance pleaded purported to be an immediate

(q) Duke 173. Page 610, 611. Atk. 630. 3 P. Wms. 281. 17 of the edition in 1805. Ves. 290. Strode v. Blackburne,

(r) Story v. Lord Windsor, 2 3 Ves. 222.

transfer of the property, the plea must aver that the vendor or mortgagor was in possession at the time he executed the conveyance. (s) But it was never held necessary to aver in the plea of a purchase that the purchaser was put in possession. (t) But this is a doubtful point; for, as was said by Lord Eldon, what is necessary to the plea of purchase for valuable consideration, as in the case of every other plea, must be averred; and it would go this length, that it is not necessary to aver that the vendor was not in possession. But this, as we have seen, is not so. But with respect to this particular species of purchaser, a mortgagee, few cases can occur wherein it is necessary to aver the taking of possession; for it is to be remembered that the possession does not, in the nature of the thing, ordinarily accompany the transaction; and the fact that the mortgagor remained in the possession, in one sense does not amount to an assertion, that the mortgagee was out of possession. (u) But where a fine and non-claim are set up as a bar to the plaintiff's right, it is not sufficient to aver that at the time the fine was levied the seller or mortgagor of the estate being seized, or *pretending to be seized*, conveyed, &c.; but it must be averred that he was actually seized. In which, however, it is not necessary to say that he was seized in fee; for if a seisin of a freehold only, at the time of the fine, be averred, it will do. (v) The plea must likewise aver a conveyance, and not articles only; for a purchaser under articles only, if he is injured, must sue at law upon the covenants in the articles. (x)

Secondly, In pleading a purchase or mortgage in bar, it is necessary to aver a valuable consideration, and that it

(s) *Trevanian v. Mosse*, 1 Vern. jun. 450. *Dobson v. Leadbeater*, 246. 3 Ves. 226. 9 Ves. 32. 13 Ves. 230. *Butler v. Every*,

(t) 9 Ves. 32. 3 Ves. 225. 13 Ves. 234. note.

(u) *Wallwyn v. Lee*, 9 Ves. 32. (x) *Brandlyn v. Ord*, 1 Atk.

(v) *Story v. Lord Windsor*, 2 571.

Atk. 630. *Page v. Lever*, 2 Ves.

was paid. An averment that the consideration is secured to be paid is not sufficient, and will be a reason to over-rule the plea ; for, as the defendant has notice of the plaintiff's title, it may never be paid. (*y*) In a bill to set aside a purchase on the ground of inadequacy, if the defendant plead to the relief, and not to the discovery, and plead the purchase deed, the several sums which were the consideration, and among the rest a sum of odd money really paid, it is not a good answer : but it should aver the payment of the consideration, independently of the recital of the purchase deed ; and moreover it should be averred that the whole of the money mentioned as the consideration in the deed was really and *bonâ fide* paid. (*z*) Some doubt seems to prevail whether a purchaser for valuable consideration, pleading his purchase, is obliged to plead the particular consideration. (*a*) But it seems that a mortgagee should plead the particular consideration, as the plaintiff may redeem him.

But a mortgagee is not obliged to prove the actual lending and payment of the money, whether it be in a suit with the mortgagor, or in the case of a subsequent mortgagee, who claims a right to tack, or a priority in payment over a prior mortgagee : but the producing the deed, or an acquittance for it, will be a sufficient evidence of the debt. (*b*) But where there are manifest signs of fraud in a mortgagee, he will be put to the proof of actual pay-

(*y*) *Hardingham v. Nicholls*, 3 Atk. 301.

(*z*) *Maitland v. Wilson*, 3 Atk. 814.

(*a*) That a purchaser must plead the particular consideration, see *Millard's case*, 2 Freem. 43. *contra*. *Day v. Arundell*, Hardr. 510. *More v. Mayhow*, 1 Cha. Ca. 34. See also *Wagstaff v. Read*, 2 Cha. Ca. 156.

(*b*) *Holt v. Mill*, 2 Vern. 279. *Piddock v. Brown*, 3 P. Wms. 288.

See farther as to proof of payment of consideration money, *Goddard v. Complin*, 1 Cha. Ca. 119. *Newcastle v. Cleyton*, Finch. Rep. 246. 16 Vin. 280. (O). That receipt without payment no avail, see *Fursaker v. Robinson*, Cha. Prec. 475. 5 Vin. 408. pl. 19. *Coppin v. Coppin*, 2 P. Wms. 294, 295.

ment; and if he thereby loses part of his money, for want of being able to make sufficient proof, it is but a just punishment of him for the fraud. (c)

Thirdly, The purchaser or mortgagee should deny notice of the plaintiff's title or claim, though not charged by the bill. (d) And he should deny notice at the time of the execution of the conveyance, or payment of the money. (e) A denial, at one of these times only, is not sufficient; (f) for if a purchaser or mortgagee has notice either before the conveyance made, or payment of the money, it is sufficient to charge him with notice. (g) But it is not necessary that he should deny notice at or before the execution of the conveyance or payment of the money; because notice before is notice at the time. (h) A denial at the time of the purchase will not do: but it must be a denial at the time of the execution of the conveyance or payment of the money. (i) A defendant cannot plead that he had no notice at or before the execution of the conveyance, or the consideration money secured to be paid; for, if the money is only secured to be paid, it may never be paid. (k)

The notice thus denied must be notice of the existence of the plaintiff's title, and not merely of a person who could claim under that title; as if a purchaser have notice of an estate tail, it is not sufficient for him to deny notice of the existence of any issue inheritable under that in-

(c) *Piddock v. Brown*, 3 P. 5 Ves. 432. 6 last lines. *Gilb. For. Wms.* 288. Rom. 60.

(d) *Aston v. Curzon*, 3 P. Wms. 244. note F. 2 P. Wms. 495. *Bodmin v. Vanderbendy*, 1 Vern. 179. 397. (h) *Jones v. Thomas*, 3 P. Wms. 243. *Fitzgerald v. Burke*, 2 Atk. 397.

(e) *Fitzgerald v. Burke*, 2 Atk. 397. (i) *More v. Mayhow*, 1 Cha. Ca. 34. *Attorney General v. Gower*, 2 Eq. Ca. Abr. 685. pl. 11.

(f) *Story v. Lord Windsor*, 2 Atk. 630. (k) *Hardingham v. Nicholls*, 3 Atk. 304.

(g) *Wigg v. Wigg*, 3 Atk. 384.

tail. (*l*) The denial of notice must be positive, and not evasive. (*m*) But where some claimants under a mortgagee, he being dead, denied that to their knowledge or belief the mortgagee had notice, the plea was allowed. (*n*) Indeed, in pleading the want of notice in an agent or third person, a denial as to belief seems all that can be had. (*o*) The denial must be general, and not confined : thus if the mortgagee by answer denies positive notice to himself, it is a negative pregnant that there was notice to the agent. (*p*) If particular facts or circumstances of notice are charged, they must be denied as particularly, and specially, as charged by the bill. (*q*) And if the plaintiff charges notice in general, as well as special facts and circumstances, there must be a general as well as particular denial. (*r*) The special and particular denial of notice or fraud must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency. (*s*) But notice and fraud must also be denied generally, by way of averment in the plea; otherwise the fact of notice, or of fraud, will not be in issue. (*t*) So that there must be a denial of notice and fraud, both in the plea and answer. (*u*)

(*l*) *Kelsall v. Bennet*, 1 Atk. 522.      *Meder v. Birt*, Gilb. 185. 2 Bro. C. C. 146.

(*m*) *Cason v. Round*, Cha. Prec. 226. 1 Ves. 97.      (*r*) *Senhouse v. Earl*, 2 Ves. 450.

(*n*) *Higgon v. Syddal*, 1 Cha. Ca. 149. See also *Jollaud v. Stainbridge*, 3 Ves. 478. 1 Ves. 97.      (*s*) *Price v. Price*, 1 Vern. 185. Anon, 2 Cha. Ca. 161. Mitf. Plead. 216. 2d edit. 6 Ves. 596. Gilb. For. Rom. 58.

(*o*) *Attorney-General v. Gower*, 2 Eq. Ca. Abr. 685. pl. 11. *Jerrard v. Sanders*, 2 Ves. jun. 187.      (*t*) Mitf. Plead. 216. 2d edit. *Davie v. Chester*, stated in the note there. 6 Ves. 796. 2 P. Wms. 495.

(*p*) *Le Neve v. Le Neve*, 3 Atk. 649. 1 Ves. 66. Amb. 440.      (*u*) Gilb. For. Rom. 58. 3 P. Wms. 244, note F. contra : but see the references in the two last notes.

(*q*) *Radford v. Wilson*, 3 Atk. 815. *Senhouse v. Earl*, 2 Ves. 450. *Jerrard v. Sanders*, 2 Ves. jun. 187. 454. S. C. 4 Bro. C. C. 322.

Where the defendant denies notice, and the plaintiff proves it by one witness only, if the denial is as positive as the assertion, and there are no circumstances in the case attaching a superior degree of credit to the witness than to the defendant, as there is but oath against oath, a court of equity will not allow the testimony of that single witness to establish the fact, but will dismiss the bill. (*x*) But if the denial is not positive, but goes to belief only; (*y*) or if the denial be only as to personal notice; (*z*) or if there are circumstances in the case which go to confirm and strengthen what a single witness swears; a court of equity will decree against the defendant. (*a*) The testimony of the witness, however, must be positive. If it be only as to hearsay, or information from some one else, the Court will not act upon it: (*b*) but if neither the denial of the defendant be positive, nor the evidence on the part of the plaintiff clear enough to make a decree, the Court will direct an issue at law to try the fact of notice; (*c*) unless the property will not bear it, in which case, it seems, it would act agreeably to the wish of the parties, in directing an issue or not. (*d*)

A mortgagee, who has put in his answer, and neglected to deny notice, cannot after a reference to the Master, and his report made, and a decree thereupon, insist upon denying notice, and offer to be examined on interrogatories in order to enable himself to tack a puisne incumbrance: but

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| ( <i>x</i> ) <i>Evans v. Bicknell</i> , 6 Ves. 184, 185.                          | 619. S. C. 1 Ves. 66.                            |
| <i>Le Neve v. Le Neve</i> , 3 Atk. 649.   | ( <i>a</i> ) <i>Walton v. Hobbs</i> , 2 Atk. 19. |
| <i>Arnot v. Biscoe</i> , 1 Ves. 97.   | <i>Janson v. Rany</i> , 2 Atk. 140.              |
| <i>Kingdome v. Boakes</i> , Cha. Prec. 19.  | Only <i>v. Walker</i> , 3 Atk. 407. 1 Ves. 125.  |
| ( <i>y</i> ) <i>Jerrard v. Sanders</i> , 2 Ves. jun. 187. S. C. 4 Bro. C. C. 322. | <i>Pember v. Mathers</i> , 2 Bro. C. C. 52.      |
| 1 Ves. 97.  | ( <i>b</i> ) <i>Hine v. Dodd</i> , 2 Atk. 275.   |
| <i>Cason v. Round</i> , Cha. Prec. 226.   | 2 Ball and Beat. 301.                            |
| ( <i>z</i> ) <i>Le Neve v. Le Neve</i> , 3 Atk. Ves. 478.                         | ( <i>c</i> ) <i>Arnot v. Biscoe</i> , 1 Ves. 95. |
|   | ( <i>d</i> ) <i>Jolland v. Stainbridge</i> , 3   |

the denial of notice must appear on the face of the pleadings. (e) If a defendant pleads his purchase or mortgage for valuable consideration, but omits in the plea to deny notice, and the plaintiff replies to it instead of setting it down to be argued, all that the defendant has to do is to prove his plea, and the bill as against him must be dismissed with costs. (f) So where a defendant in his answer states himself a purchaser or mortgagee for valuable consideration, and the plaintiff instead of excepting to it, replies to it; if the defendant proves the case relied on in his answer, the bill as against him must, as it seems, be dismissed, unless the plaintiff can prove circumstances of fraud. (g)

But it is not absolutely necessary that a person should plead himself a mortgagee or purchaser for valuable consideration without notice, though it is prudent so to do. If a man buys an estate, and a bill is filed, and a title shewn to relief, he may plead that he is a purchaser for valuable consideration without notice; and he must support his plea by denying all the circumstances from which notice may be implied: and if, after all that can be said to charge him with notice, he is hardy enough to swear that he had no notice, and to deny all the circumstances; and he does plead, and refuses to try the question in any other way; then it must rest very much with his own conscience. But if he forbears to plead, and if it turns out in the progress of the suit that he was a purchaser for valuable consideration without notice, it is too much to deprive him of the effect of that, merely because he does not stop the suit at first, if it be so in fact. (h)

(e) *Brace v. Duchess of Marlborough*, 2 P. Wms. 495. 6th Resolution.

(g) *Eyre v. Dolphin*, 2 Ball and Beat. 290. 303.

(f) *Harris v. Ingledew*, 3 P. Wms. 94. 2 Ball and Beat. 302.

(h) Per Lord Eldon in *Rancliffe v. Parkyns*, 6 Dow. 230.

3d, A mortgagee denying notice is not obliged to discover his title deeds ; which is an invariable rule in equity, and depends upon the denial of notice ; (i) insomuch that the Court has refused to give any assistance against a purchaser, (and a mortgagee is such) either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another ; and precedents of this nature are very numerous. (k) Nay, though a mortgagee may have been guilty of fraud in obtaining the legal estate, (l) or the possession of a deed ; (m) yet will not a court of equity take the advantage of it from him, or compel him to discover it. And where an attorney, having a deed of settlement in his possession for a particular purpose, had delivered it over to a mortgagee, after having said in his answer that he was ready to produce it, as the Court should direct ; the Court held that he was not guilty of a breach of trust, as he was equally a trustee for the mortgagee as for the mortgagor, (who was only tenant in special tail, and no fine levied, or recovery suffered,) and therefore dismissed a bill for discovery brought by the heir in tail. (n)

As to a jointress, indeed, where the plaintiff claims as

(i) *Senhouse v. Earl*, 2 Ves. 450. *Millard's case*, 2 Freem. 43. *Pellat v. Ballard*, 2 Cha. Ca. 73. *Ibid.* 135. *Anon.* 2 Cha. Ca. 136. *Abney v. Williams*, 1 Vern. 27.

(k) *Bassett v. Nosworthy*, Finch. 102. 2 Ves. jun. 457.

(l) *Culpepper's case*, cited 2 Freem. 124. *Bromley v. Hammond*, 2 Cha. Ca. 23. *Harcourt and Knowel*, cited 2 Vern. 159.

(m) *Sir John Fagg's case*, cited 1 Vern. 52. 2 Vern. 159. S. C. 1. Cha. Ca. 68. *nomine Sherly v.*

*Fagg*, S. C. as also another case, cited 2 Freem. 123, 124. In some of the reports of this case it is stated that the defendant had *stolen* the deed. *Brampton v. Barker*, cited 2 Vern. 159. *Siddon v. Charnells*, Bunb. 298. 9 Ves. 26.—*Hacket v. Wakefield*, Hard. 172. *contra*: but see Finch. 102. 2 Ves. jun. 457. And *Higgon v. Syddal*, 1 Cha. Ca. 149. S. C. 2 P. Wms. 493.

(n) *Siddon v. Charnells*, Bunb. 298.



heir at law to the person who made the jointure, and there is no appearance of any settlement, the Court will, upon the plaintiff's offering to confirm the jointure, oblige a production of the deed. (*o*) But as to a mortgagee, the case is entirely otherwise; for, if the plaintiff brings his bill to redeem ever so strongly, yet he is not entitled to see the mortgagee's title deeds, because a third person may find out a flaw in them. (*p*) And the rule appears to be the same on motion where a sale is to be to raise the mortgage money. (*q*) So, upon decree for a foreclosure nisi, where the defendant moved that the plaintiff might lay the deeds before counsel in order to have the mortgage assigned to a person who was willing to advance the money, the Lord Chancellor would not oblige the mortgagee to produce the title deeds; but only ordered that he should give the defendant a copy of the mortgage deed at the defendant's charge: (*r*) though he thought the refusal to produce was a good reason to enlarge the time to redeem, if the defendant should apply for it. (*s*) But the rule is imperative that a mortgagee shall never be compelled to give up his security till he has his money in his pocket. (*t*)

A distinction is taken by Lord Chief Baron Gilbert between a mortgage or sale by tenant for life, where the title deeds are delivered over, and a mortgage or sale by a tenant in tail, with a delivery of the deeds; in the first instance, that a mortgagee cannot plead his mortgage, and insist that he is not obliged to deliver over the title deeds, or discover the title; but that in the latter he can. The

(*o*) 2 Ves. 450.

(*r*) Anon. Mosl. 246.

(*p*) 2 Ves. 450.

(*s*) Mosl. 246. And see 2 Atk.

(*q*) 2 Ves. 450. Per Hardwicke, 332.

Chancellor, Anon. Mosl. 246. contra, said by counsel argu. if the mortgagee consents to the sale.

(*t*) Postlethwaite v. Blythe, 3 Mad. 242. 244. See Fenwicke v. Reed, 1 Mer. 114. and ante 209.

reason for which difference, as given by Gilbert, is, that the tenant in tail, being master of the estate, is likewise owner of the deed; and therefore, having pledged the deed as well as the estate for money, the issue in tail cannot have the aid of a court of equity to have such deed, unless he pay the money: but in the case of the tenant for life, there he had only a particular property in the deed, and was not master of the estate so as to bar it; and therefore the court of equity will make him deliver the deed to the person who was the prior purchaser upon valuable consideration, that is, the remainderman in tail. (*u*) And upon this distinction Lord Rosslyn seems to have proceeded in the case of *Strode v. Blackburne*: (*x*) but Gilbert's distinction, as well as the case of *Strode v. Blackburne*, have been denied and over-ruled by a case before Lord Eldon, in which, a tenant in tail in possession under a marriage settlement brought a bill for discovery and delivery of title deeds; to which the defendant pleaded a mortgage by the tenant for life, alleging himself to be seized in fee, and in possession of the premises and deeds, as apparent owner. And his Lordship after consideration, and the plea having stood a considerable time for judgment, allowed it. (*y*)

In a bill to set aside a purchase charging the defendant with notice of a trust, and that such a lease in his possession mentions it; if the defendant swears himself a purchaser without notice of any trust, and that the said lease mentions no such trust; to which the plaintiff replies, and the defendant proves his purchase, and the plaintiff proves no notice upon him; the plaintiff cannot insist that the defendant must produce his lease on the ground that

(*u*) Gilb. For. Rom. 60, 61.

(*x*) 3 Ves. 222.

(*y*) *Wallwyn v. Lee*, 9 Ves. 24.

*Brampton v. Barker*, cited 2 Vern. 159.

his answer being replied to, he must prove it, which he cannot do without producing the deed : but it will be considered only a side-wind to make the purchaser expose his title. (z) But if the plaintiff falsifies the answer, (a) or if the bill charges facts of notice, which the defendant does not deny, (b) a court of equity would compel a discovery.

(z) *Hall v. Atkinson*, 1 Eq. Ca. Abr. 334.

Abr. 333, 334. S. C. 2 Vern. 463. (b) *Jerard v. Sanders*, 2 Ves. jun.

(a) *Hall v. Atkinson*, 1 Eq. Ca. 187.

## CHAPTER XI.

OF THE LIABILITY OF A MORTGAGEE TO SEE TO THE APPLICATION OF THE MORTGAGE MONEY—OF THE TENDER OF MORTGAGE MONEY—AND OF THE PROOF OF PAYMENT OF MORTGAGE MONEY.

## SECTION I.

OF THE LIABILITY OF A MORTGAGEE TO SEE TO THE APPLICATION OF THE MORTGAGE MONEY.

WHERE an estate is vested in trustees upon trust by mortgage or sale (which, if for a particular purpose, implies a power to mortgage(*a*)) to raise money to answer a particular purpose, and a mortgagee has notice of the trust respecting the mortgage money, he must see to the application of it; for, if the trustees fail to lay out the money according to their trust, the mortgage will be an invalid security as to so much of the money as has been misapplied. (*b*)

But this liability of the mortgagee to see to the application of his money is taken away in two instances.

First, where the deed or will authorizing the mortgage or sale has given the trustees a power to give effectual dis-

(*a*) *Mills v. Banks*, 3 P. Wms. 9.; ante 45.

(*b*) *Cotterel v. Hampson*, 2 Vern. 5.

charges, in which case, whatever be the trust, if a mortgagee pays his money, and takes a receipt according to the directions of the deed or will, he will be discharged from seeing to the application of his money.

And, secondly, where the trust is unlimited and undefined, as a trust to pay debts generally, in which case a purchaser or mortgagee would be indemnified, and not obliged to see to the application of his money. (c) So if the trust be in the first instance to pay debts, and then legacies, the trust for payment of debts intercepts the trust for payment of legacies, and discharges a purchaser or mortgagee from seeing to the payment of the legacies; for they cannot be paid till after the debts. (d)

So if the trust be of such a nature as to require time and discretion, as to pay such creditors as may come in within eighteen months, (e) to raise money for the advancement of a child, &c.; in which instances, as it is generally thought, a mortgagee or purchaser is not obliged to look to the application of his money.

So if the trustees are directed to place out the money in the funds, or other security upon trusts, it has been always considered sufficient in practice if the purchaser or mortgagee see the money laid out accordingly, and procure the trustees to enter into a declaration of trust; for it is thought impossible that the raiser of the trust should expect from a purchaser any further degree of circumspection than during the time the purchase transaction is carrying

(c) *Culpepper v. Aston*, 2 Cha. Ca. 115. 221. *Anon.* Mos. 96. *Smith v. Guyon*, 1 Bro. C. C. 186. *Tenant v. Jackson* and *Cotton v. Everard*, in note there. *Langley v. Lord Oxford*, Amb. 17. And cases in the subsequent notes.

(d) *Williamson v. Curtis*, 3 Bro.

C. C. 96. *Jebb v. Abbett* and *Benyon v. Gollins*, 1 Bro. C. C. 186. in note; and also in *Butler's note* Co. Lit. 290. n. 1. s. 12. *Rogers v. Skillicorne*, Amb. 188.

(e) *Balfour v. Welland*, 16 Ves. 151.

on. (f) According to the opinions of Mr. Booth and Mr. Wilbraham, indeed, given in 1758, it appears that if the purchaser saw that the money was properly invested, that alone would be sufficient to discharge him from any further responsibility: (g) but the modern practice is to require a declaration of trust also. (h) The reason for which latter precaution, it seems, is only to furnish the purchaser with some evidence that the money was properly invested; for in favour of the *cestuis que trust* the money would be equally liable, under the original instrument, though there were no declaration by the trustees; and, therefore, it follows that any other evidence of the due investment would be sufficient to discharge a purchaser or mortgagee; but that, where a declaration of trust is given, the purchaser should take care to be provided with the means of having it forthcoming whenever he may have occasion to shew that he had performed his part of the trust.

But if the trust be for payment of particular debts specified either in the instrument creating the trust, or in a schedule, (i) or by a master's report ascertaining them in a schedule, where an estate is sold under an order of Court, (k) or by a private act of parliament, (l) which is more like a deed, such specification or schedule obliges a purchaser or mortgagee to see to the application of the money. In which instances a purchaser or mortgagee, instead of paying the money to the trustees, should see to the application of it himself, and take assignments from the creditors; or he may apply to the Court that the money be placed in

(f) 2 Cas. and Op. 114. Sugd. on Vend. and Pur. 416. 4th ed.

(g) 2 Cas. and Op. 114.

(h) Sugd. on Vend. and Pur. 416. 4th ed.

(i) 2 Cha. Ca. 223. Barnard. 81. 1 Vern. 260. Anon. Mosl.

96. Spalding v. Shalmer, 1 Vern. 301. Lloyd v. Baldwin, 1 Ves. 173.

(k) Lloyd v. Baldwin, 1 Ves. 173.

(l) Cotterel v. Hampson, 2 Vern. 5.

the bank, and not taken out without notice to him. (*m*) So, though a general charge does not make a purchaser before the suit see to the application of the money; yet, if any of the creditors commence a suit for sale and payment, a purchaser, after the suit commenced, would be bound to it. (*n*)

But although the trust be for payment of particular debts, yet is not a purchaser obliged to see whether more be sold than is sufficient to pay the debts; for he is not obliged to enter into the account; and the trustees cannot sell just so much as is sufficient to pay the debts. Besides the trust is in most instances to raise money for their costs and charges. (*o*) And so, I presume, a mortgagee is not obliged to see whether more money be raised than is sufficient to pay the debts and expenses.

If an estate be devised to trustees for payment of debts generally, and the trustees convey to the heir subject to the trust, a mortgagee from the heir is equally discharged from seeing to the application of the money as he would have been if the trustees had mortgaged; for the power to give a discharge lies not in the person, but in the very nature of the trust; though it be considered a breach of trust in the trustees to convey over; and, if the heir misapply the money, they will be liable. (*p*)

But, if lands be conveyed to trustees to sell and apply the money upon specified trusts, with a power for them to give discharges, but no power to change trustees; if one of the trustees conveys over to the others, the remaining trustees are not by themselves competent to give a discharge for the purchase-money; because, though by the

(*m*) *Lloyd v. Baldwin*, 1 Ves. 173, 174.

(*n*) *Walker v. Smallwood*, Amb. 676. *Culpepper v. Aston*, 2 Cha. Ca. 115, 116, 223.

(*o*) *Spalding v. Shalmer*, 1 Vern. 301. *Lutwych v. Winford*, 2 Bro.

C. C. 248.

(*p*) *Hardwick v. Mynd*, 1 Austr. 109. See also 8 Ves. 432.

conveyance the lands passed, yet the power to give a discharge, which was personal to the trustee, he could not convey away. (*q*) But in a case of this sort, if the trustee, instead of conveying over, renounces, the receipt of the continuing trustees alone will be sufficient; in the same manner as where a trustee dies in the life-time of the testator, or before the time for sale arrived. (*r*)

With respect to the obligation of a purchaser or mortgagee to see to the application of his money, there is no difference in the rules, whether the estate be conveyed to trustees to be sold, or only charged and then devised over. For if an estate be charged with debts generally, and subject to such charge devised to one in fee, the receipt of the devisee will be a sufficient discharge both to the purchaser and to the lands. (*s*) So if, subject to a general charge for debts, the estate be devised to tenants for life, remainder in tail, with remainders over, a purchaser taking a proper conveyance from the tenants for life and the first tenant in tail would be safe. (*t*) But still there is this difference between a devise to sell and a charge of debts with a devise over, that, in the latter instance, if subject to the charge, the estate be devised to infants, as there is no person appointed to sell, (*u*) a sale cannot take place till the parties are competent to convey. And the statute of the 7 Anne, c. 19. would not assist a person seeking a sale before that time; for, in order to bring an infant

(*q*) *Crewe v. Dicken*, 4 Ves. 97.

(*r*) *Crewe v. Dicken*, 4 Ves. 97.  
See also *Smith v. Wheeler*, 1 Ventr.  
128. *Attorney-General v. Glegg*,  
Ambl. 584. S. C. 1 Atk. 356.

(*s*) *Elliot v. Merryman*, Barn.  
Ch. Rep. 78. S. C. 2 Atk. 41.  
S. C. Ambl. 189, in marg. *Walker*  
*v. Smallwood*, Amb. 676. 6 Ves.

654, note; which have overruled  
*Anon. Mos.* 96. and *Newell v. Ward*,  
Nels. C. R. 38. as to this point.

(*t*) See *Newell v. Ward*, Nels.  
C. Rep. 38, as to the conveyance  
taken by *Brightmore*, the pur-  
chaser, in that case.

(*u*) *Barn. Ch. Rep.* 80.



under that statute, or a lunatic under the 4 Geo. 2. c. 10., he must be a bare trustee, without duties to perform, or any beneficial interest. (x)

But, if lands be charged with the payment of annuities, those lands will be charged in the hands of a purchaser or mortgagee, and cannot be discharged; for it is the very purpose of making the lands a fund for that payment, that they should be a constant and subsisting fund. (y)

If lands be devised to trustees, upon trust to be sold for payment of debts, or debts and legacies, "in case the personal estate shall prove deficient," or, upon trust, to raise "as much money as the personal estate shall fall deficient in paying," by the general opinion of the profession a purchaser or mortgagee is not bound in this case to enquire whether the real estate is wanted or not. (z) But it seems that in this, as well as in every other case where the real estate is only an auxiliary fund for the payment of debts, or debts and legacies, a purchaser or mortgagee must not be apprized that there are no debts, or that all the debts and legacies are paid. (a) And it seems proper also in such cases, to recite in the deed of conveyance that the personal estate is insufficient. (b)

But, to prevent questions of this kind from arising, as has been observed by Mr. Butler, it is usual to insert in all instruments by which real or personal estates are vested in trustees upon trust, to raise money by sale

(x) *Tutin, Ex parte.* 3 Ves. and Bea. 149.

(y) *Elliot v. Merryman*, Barn. 78. S. C. 2 Atk. 41. S. C. Amb. 189. in marg. See also *Wynn v. Williams*, 5 Ves. 130.

(z) *Butl. note Co. Lit.* 290 b. note 1. s. 12. 1 Cru. Dig. 544, 1st edit. 529, 2nd edit. which cites *Cul-*

*pepper v. Aston*, 2 Cha. Ca. 115. 221. *Sugd. on Vend. and Pur.* 426, 4th edit. 449, 5th edit. Vide *Fearne's Posth. Works*, 121, contra.

(a) See *Ewer v. Corbett*, 2 P. Wms. 149. six last lines.

(b) *Fearne's Posth. Works*, 122, 123, in note.

or mortgage, a clause expressly discharging the purchasers or mortgagees from seeing to the application of the money paid by them. And where the trust is to raise by sale or mortgage of the real estate "so much money as the personal estate is deficient in producing," it seems advisable to extend this clause a degree further, by expressly discharging the purchaser or mortgagee from the obligation of enquiring whether the personal estate has been got in and applied; and by expressly authorizing the trustees to raise any money they think proper, by sale or mortgage, though the personal estate be not actually got in or applied. For it frequently happens that the getting in of the personal estate is attended with great delay and difficulty; during which time the real estate cannot, perhaps, be resorted to; which, however, will be effectually obviated by inserting a clause to the above effect. It should, however, be accompanied with a further direction, that "so much of the personal estate as would have been exhausted by the debts, or debts and legacies, in case there had been no charge on the real estate;" and "so much of the money raised, from the real estate, as shall remain after answering the trust;" shall be laid out in land to be settled on the devisees of the real estate, in the same manner as they would have taken the real estate under the will. (c) But, independently of a clause to this latter effect, the money arising from the real estate, and which remains after answering the purposes of the trust, will go to the person who would otherwise have been entitled to the land. (d)

But if there be any specific charges upon an estate prior to the instrument conveying it to trustees to sell, and declaring that their receipts shall be sufficient, a mortgagee

(c) Butler's note (1) to Co. Lit.  
290 b. sec. 12.

(d) Collect. Jurid. Vol. I. p. 214  
to 245.

or purchaser must see to the payment of such prior specific charges; for the liability of a mortgagee or purchaser to see them discharged cannot be taken away by an instrument executed after such liability has once attached. (*e*)

But though a purchaser or mortgagee was originally liable to see to the payment of an incumbrance charged upon the estate, and neglected so to do; yet, after a great length of time, it will be presumed to have been paid. (*f*)

Where a will, instead of devising lands to trustees to be sold, merely directs that the trustees shall sell "if the personal estate fall short in paying the debts," this is a power, as contradistinguished from a trust to sell; and, in order to authorize a sale, it is absolutely necessary that the personal estate should be deficient. (*g*) And further, if the power be to raise "so much money as the personal estate shall fall short in paying the debts," the trustees or donees of the power cannot sell more than just enough to answer the deficiency. (*h*) And this cannot be ascertained till the personal estate has been got in and applied.

Therefore in all cases where, instead of a devise upon trust to sell, a *mere power* be given "in case of a deficiency to raise so much money as the personal estate shall fall short in paying the debts;" a mortgagee must be satisfied, first, of the deficiency in the personal estate, and, secondly, that no more be raised than just sufficient to make up the deficiency. (*i*) And the mortgagee must be satisfied of

(*e*) Pract. Points in Conveyancing, p. 72. pl. 148.

(*f*) Lord Braybrooke v. Inskip, 8 Ves. 417. 432. As to presumption of due payment arising from length of time, see also Jones v. Turberville, 2 Ves. jun. 11. Ibid. 280. 5 Ves. 135. Burke v. Crosbie, 1 Ball and Beat. 489.

(*g*) Dike v. Ricks, Cro. Car. 335. S. C. Wm. Jon. 327. Co. Lit.

290 b. note (1) s. 12. Culpepper v. Aston, 2 Cha. Ca. 115. 221, 223.

(*h*) Dike v. Ricks, 1 Rol. Abr. 329. pl. 9. 3 Vin. Abr. 419. pl. 9. S. C. Ubi supra in last note.

(*i*) Dike v. Ricks, Cro. Car. 335.

both these points, though there may be the usual clause discharging him from seeing to the application of the money : for such clause does not extend to alter or enlarge the power to raise, but only discharges the mortgagee from seeing to the application in the event of the power *arising*. (*k*)

Notice that a chattel is specifically bequeathed, or that it is bequeathed charged with a legacy, or a specific debt, is not sufficient to affect a purchaser or mortgagee of it from the executor, with a trust for the legatee, or to put him upon the obligation of seeing to the application of his money ; (*l*) for a testator cannot prevent his chattels from vesting in his executors charged with a trust in the first instance, implied by law, for the payment of general debts.

In conformity to which general rule it is held, that a mortgage may be made by all, or only one, of many executors, for each is competent ; and that as well of a chattel real, in which the legal estate passes, as of a bond or chose in action, which cannot be assigned at law ; and that such mortgage may be made either by an absolute assignment, or by deposit ; and that a mortgagee is not obliged to enquire for what purpose the money is about to be applied ; and that such mortgage will be good as against a specific legatee, a creditor, a pecuniary or residuary legatee, and co-executors. (*m*)

But, if the mortgagee has notice that there are no debts, or that all the debts have been paid ; (*n*) or if there be any fraud or collusion in the transaction, as, if it be known to the mortgagee that the borrower is about to

(*k*) Sugd. on Vend. 427, 4th ed. cases there reviewed by Lord Eldon.

(*l*) Ewer v. Corbet, 2 P. Wms. 148.

(*n*) Ewer v. Corbet, 2 P. Wms. 149.

(*m*) M'Leod v. Drummond, 14 Ves. 353. S. C. 17 Ves. 152, and

apply the money, so raised on the testator's property, to objects with which his affairs have no connexion, which, for instance, would be the case, if an executor were to mortgage for a debt of his own ; in any of these instances, it seems that the mortgage would be ineffectual, and that it might be set aside by a creditor, a specific legatee, a pecuniary, or a general or residuary legatee. (o)

So a mortgage made by an administrator to a person having notice that the next of kin require a sale, is liable to be set aside. (p)

But, if an executor has assented to the bequest of a chattel personal, no mortgage made by him afterwards will be good. (q)

So a mortgage, which was originally liable to be set aside, may become good by the neglect of the legatee to question it within a proper time ; particularly, if it has been assigned over many times. (r)

Upon this principle, of all chattels vesting in the first instance in executors for the payment of debts, an account settled between a mortgagor and the executor of the mortgagee would be binding upon a specific legatee of the mortgage, though the mortgagor had notice of the bequest. (s)

Where a mortgage is made the subject of a marriage-settlement, and assigned upon various trusts, there should always be a separate deed, by which the mortgage-money and the estate in mortgage should be assigned to the trustees

(o) *Scott v. Tyler*, 2 Bro. C. C. 431. S. C. 2 Dick. 712. *Hill v. Simpson*, 7 Ves. 152. *M'Leod v. Drummond*, 14 Ves. 353. S. C. 17 Ves. 152.

(p) *Drohan v. Drohan*, 1 Ball and Beat. 185.

(q) *Tomlinson v. Smith*, Finch. 378.

(r) *Bonney v. Ridgard*, stated 4 Bro. C. C. 130. 138. S. C. 17 Ves. 97, cited. See also 17 Ves. 165.

(s) *Langley v. Earl of Oxford*, Amb. 17. As to the result of which case see Reg. Lib. B. 1747, fol. 300. and Sugd. on Vend. and Pur. 435. 4th edit.

of the settlement, with a declaration that their receipt for the mortgage-money shall be a discharge to the parties paying it. In making the assignment by a separate deed, an advantage is given to the mortgagor, by his being kept from being implicated with the trusts of the settlement, and by having that deed in his custody when the mortgage is paid off, which preserves the chain of the title, and which he probably otherwise would not have; an advantage also is given to the persons interested in the settlement, from having the contents and operation of the settlement kept from the knowledge of the mortgagor, and those claiming under him. (*t*)

## SECTION II.

### OF THE TENDER OF MORTGAGE MONEY.

Mortgage-money may be tendered either by the mortgagor; or, if he die before the day of payment, by the heir or executor, or administrator of the mortgagor; or, if there be no executor or administrator, by the ordinary, or by the guardian in socage of the heir of the mortgagor, or by any other person, either by their commandment precedent, or assent subsequent; and payment or tender by either of them is a good performance of the condition. (*u*) But, after the heir of the mortgagor has attained the age of fourteen years, the guardian in socage cannot appoint a person to make a tender: but the infant may. (*x*) But it seems that a testamentary guardian, under the 12 Car. 2. c. 24. may make a legal tender, or

(*t*) Butler's note (1) to Co. Lit. 209 a.

290 b. sec. 12.

(*x*) *Watkins v. Astwicke*, 1 Leon.

(*u*) *Shep. Touch.* 140. Co. Lit. 34. *Moor.* 222. *Owen* 137.

appoint another to do so at any time while the infant is under twenty-one.

If the condition be that the mortgage shall be void if the mortgagor and I. S. pay at a certain day, and the mortgagor die before the day of payment, I. S. may alone pay it, and it will be a good performance of the condition. (*y*)

If the condition be to pay to the mortgagee or his heirs, and the mortgagee die before the day of payment, the mortgagor cannot pay it to the executors so as to make it a performance of the condition. (*z*) But if the condition be to pay to the mortgagee, his heirs, or executors; there, if the mortgagor pay it at the precise day, he hath his election to pay it either to the heir or executor. (*a*) But where the precise day of payment is past, and the estate forfeited at law, all election is gone, and the money must be paid to the executor; for equity always follows the law; and the precise day of payment being past, it is the same as if neither heir nor executor had been named. (*b*) Now, at law, if a feoffment be made upon a condition to re-enter, and neither heir nor executor be named, and the feoffee die before the day of payment, the money must be paid to the executor, and not to the heir. (*c*)

If the condition be to pay the money to the mortgagee, his heirs or assigns; or to the feoffee, his heirs or assigns, (for the rule is the same,) and the feoffee make a feoffment over, it is in the election of the feoffor to pay the money to the first feoffee, or to the second feoffee; and so, if the first feoffee dieth, the feoffor may either pay the money to

(*y*) Shep. Touch. 141. Co. Lit. 219.

(*z*) Co. Lit. 210 a.

(*a*) Co. Lit. 210 a. 1 Cha. Ca. 285. Rightson v. Overton, 2 Freem. 20.

(*b*) 1 Cha. Ca. 285. 2 Freem. 20. Turner's case, 2 Ventr. 348. 11 Vin. 148. pl. 41. and the references in the margin there.

(*c*) Lit. Sec. 339. 1 Cha. Ca. 285. 2 Ventr. 348. 2 Freem. 20.

the heir of the first feoffee, or to the second feoffee ; for the law will not force the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectual or not, but at his pleasure ; and the first feoffee and his heirs are expressly named in the condition. (*d*) But this is only so at law, to enable the feoffee or mortgagee to regain his estate. For if the condition be forfeited, and the mortgagor has notice that the mortgage has been assigned over, he must pay his money to the assignee.

In the case of *Whitlock v. Waltham* (*e*) it was resolved, 1st. That if a scrivener be entrusted with the custody of a mortgage bond, he may receive the interest ; and though he fails, yet the mortgagee shall bear the loss : and that so it is also in such case if he receive the principal and deliver up the bond ; for, being entrusted with the security itself, it shall be presumed he is entrusted with a power over it, and with a power to receive the principal and interest ; and the rather, because the giving up of the bond upon the payment of the money is a discharge thereof. Otherwise, if the obligee take away the bond ; for then he hath no authority to receive any money.

2dly. That if a scrivener be entrusted with the mortgage deed, not the bond, he hath only authority to receive the interest, but not the principal ; because the giving up the deed is not sufficient to restore the estate, but there must be a reconveyance ; whereas the giving up the bond is in law an extinguishment of the debt.

3dly. That though the scrivener hath neither the custody of the mortgage, nor the bond ; yet, if the mortgagee agrees that the mortgagor shall pay the interest to the

(*d*) Co. Lit. 210 a.

See also *Martin v. Kingsly*, Cha.

(*e*) 1 Salk. 157. S. C. 1 Eq. Ca.

Prec. 209. for the two first points.

Abr. 145. pl. 4. S. C. 1 Vern. 150.

*Henn v. Conisby*, 1 Cha. Ca. 93.



scrivener, the interest may be well paid to the scrivener as long as the mortgagee lives.

And, 4thly. That if the mortgagee dies, and his executor comes to the scrivener, and receives interest of him, and at his hands, that became due after the death of the mortgagee; this is a good payment; and if, after such receipt the scrivener breaks, the mortgagor shall not bear the loss; for it was the mortgagee that trusted the scrivener; and the executor came into the agreement, and thereby renewed it, supposing it was determined by the death of the mortgagee: but it was rather an agreement than an authority, and could not die with the party.

The money being a sum in gross, and collateral to the title of the land, the mortgagor must tender it to the person of the mortgagee; and it is not sufficient for him to tender it on the land. (f) But if the mortgagee be out of the realm of England, the mortgagor is not bound to seek him, or to go out of the realm unto him. And for that the mortgagee is the cause that the mortgagor cannot tender the money, the mortgagor shall enter into the land, as if he had duly tendered it according to the condition. (g) Which principle may be attended with the most serious consequences; for suppose the first mortgagee out of the realm on the day of payment, and the mortgagor enters upon the land, and after the day mortgages over to a second mortgagee, who has no notice of the first; in such case it seems the first mortgagee would be postponed to the second, for the second has the legal estate and as much equity as the first; and then equity will not interfere. It seems a proper precaution, therefore, for a mortgagee, going abroad before the day of payment, to appoint some person to receive the money, of which appointment the mortgagor should have notice.

(f) Co. Lit. 210. a. 210. b.

(g) Co. Lit. 210. b.

But if the time and place be appointed whereon to pay the money, there the mortgagor need not seek for the mortgagee, nor be in any other place but the place appointed in the indenture, nor be there longer than the time specified. And the more specially the time and place be put, according to Littleton, the better. *(h)*

If the condition of a mortgage be to pay at the end of six months from the date of the mortgage deed, it seems that the computation will be according to calendar and not lunar months; and of this opinion Willes, C. J., reports himself, and Abney and Barnett, justices, to have been: but the point was not decided. *(i)*

In this place we may introduce in one view an opinion published amongst the Cases and Opinions, *(k)* parts of which are noticed in other parts of this Work. The author is anonymous: but it bears very much on the point under consideration; and, as it will be found, proceeds on a case where the condition in the mortgage deed has been forfeited. “It is clear that a mortgagee may call in his mortgage money when he pleases, and may require it to be paid at as short a warning as he pleases; for it never was held that upon a trial of an ejectment, or upon a bill to foreclose, the plaintiff should be nonsuited, or the bill dismissed, because the mortgagee did not give six months’ notice to pay the money in, or any other definitive notice. The reason is because at law the estate is his own; and no notice is requisite to entitle a man to recover his own, who stands in the situation of mortgagee; so that whenever the mortgagee calls for his money, the mortgagor must pay it; and the mortgagee may, at his pleasure, proceed at law to recover the possession, or in equity to foreclose. But the mortgagor is not in the same situation: he cannot compel

*(h)* Lit. Sec. 349.

585. 588.

*(i)* Dyer v. Sweeting, Willes, R.

*(k)* Vol. II. p. 51.

the mortgagee to take his money at a moment's warning: he must give the mortgagee six months' notice to recover it; or, which is the same thing, pay him six months' interest in advance; because, the day of redemption at law being passed, he has lost his estate at law, and can be let in to redeem by a court of equity only; and a court of equity will not assist unless he will do equity; and the Court holds that it is equitable that the mortgagor shall give six months' notice of paying in the money to enable the mortgagee to provide another place for it; so that it is incumbent on a mortgagor to give notice. But when the mortgagee requires payment, all notice is out of the case: it is not notice, but a demand, which the mortgagee has a right to make without any limitation of time whatever; and consequently, when the mortgagee has demanded his money, the mortgagor may bring it him the next day; and if he refuses to receive it, he can no longer demand interest; for his demand of the money has made notice from the mortgagor wholly unnecessary. When the mortgagee has demanded payment of his money, it must be brought to him personally; for though a place of repayment is mentioned in the mortgage deed, yet the day of repayment being passed, the mortgagee is not bound to attend there, and therefore it must be brought to him personally. It is thus upon a general demand: but he may give a special notice. The mortgagee, when he makes the demand, has a right to appoint a time and place for payment of the money; and then the mortgagor must attend at the time and place prefixed by the mortgagee to tender the money; otherwise interest will run on to the time of actual payment. But if the mortgagor comes with the money to the mortgagee, or to the time and place appointed, he has a right to require a production and delivery of the mortgage deed, and to have it delivered up to him; as the production and delivery of the mortgage deed is the proper evidence to the mort-

gagor that the mortgagee has not assigned the mortgage to any other person, but has the right to receive the money. Suppose the mortgagee has received the money from a third person, and assigned over and delivered the mortgage deed to the assignee, and then calls on the mortgagor, and he pays it without requiring to have the mortgage deed delivered up, most certainly the assignee can have no benefit of the mortgage, nor can compel him to pay it over again, though the original mortgagee, who received the money, is become insolvent. But this is confined to the delivery of the mortgage deed; for the mortgagor has not a right to annex a condition to the payment, that the mortgagee shall execute an assignment; because it frequently happens that a proper assignment or reconveyance cannot be prepared without an inspection of the title deeds in the mortgagee's hands; and it is understood that a mortgagee is not compellable to produce the title deeds before he has actually received his money; for otherwise, under pretence of repayment, the mortgagor may look into the title deeds with a view to discover faults, and defeat the security: but the mortgage deed itself which puts him in the character of mortgagee, and without which he cannot resist the production of the title, must always be open to the inspection of the mortgagor, that he may know his right to redeem. It follows, therefore, that when the mortgagor comes to pay his money, either to the mortgagee himself or to his agent, at a time and place appointed, he has a right to expect to find the mortgage deed there, and that it shall be ready to be delivered to him when the money is paid; and when that has been done, he has a right to call for the title deeds to enable him to prepare a proper assignment, and to call on the mortgagee to execute it afterwards. The mortgagor is in no danger in paying the money, upon receiving the mortgage deed without an assignment; because the mortgage

and the receipt together will always shew what the debt is, and that the debt is satisfied; and from thenceforth the mortgagee becomes a trustee for the mortgagor of the legal estate."

Where the time for redemption is past, and the mortgagor gives six months' notice of his intention to pay the money, he may, at the same time, appoint a time and place to pay it in. And if the mortgagee does not object at the time, he cannot afterwards insist on a personal tender. (*l*)

A tender in bank notes is considered a good tender, provided no objection be made to it on that account. (*m*) But, as it has never yet been decided that a tender of bank notes is at all events a good tender, it seems advisable for the mortgagor to offer to turn it into money. (*n*) However, if the sum is large, and to be paid within a short time, which it is impossible to produce in specie within the time, a tender in bank notes would, it should seem, be a ground for equitable relief. (*o*)

If lawful tender be once made on the day appointed by the condition, and the mortgagee refuses it, the land is for ever quit of the condition; and the mortgagor may hold it as before: but yet the mortgage debt remains, which the mortgagee may, at any time, recover by action of debt. (*p*) But, if a person without any loan, debt, or duty preceding, make a gratuitous mortgage, and afterwards tenders the money on the day, which the mortgagee refuses, the mortgagee is without remedy. (*q*)

(*l*) Gyles v. Hall, 2 P. Wms. 378.

(*m*) Wright v. Reed, 3 Term Rep. 554. 2 Scho. and Lef. 534. 1 Eq. Ca. Abr. 319.

(*n*) 3 Term Rep. 554. Austen

v. Executors of Dodwell, 1 Eq. Ca. Abr. 318. pl. 9.

(*o*) 2 Scho. and Lef. 534.

(*p*) Lit. Sec. 338. Co. Lit. 209.

b. Gilb. Chan. 311.

(*q*) Co. Lit. 209. b.

## SECTION III.

## OF THE PROOF OF PAYMENT OF MORTGAGE MONEY.

THE proof of mortgage money having been paid is either actual or presumptive: actual, as if the mortgagor has got a receipt for the money; and presumptive, if the mortgagor has been allowed to continue in possession of the estate a long time without any demand for the money, or payment of interest. The time at which this presumption arises has been always understood to be twenty years,<sup>(r)</sup> in analogy to the case on bonds,<sup>(s)</sup> and as it were squaring the rule by the time at which equity raises a presumption against the mortgagor, that he has relinquished his equity of redemption, and in favour of the mortgagee continuing in quiet possession of the estate.<sup>(t)</sup> Though there are dicta in the books from which it would appear that the case of bonds and mortgages are different, and that it requires a greater length of time to presume payment of a mortgage than a bond. The reason for which distinction, as given by Sir William Fortescue, Master of the Rolls, is, that the mortgagee shall be supposed continuing in possession, and the mortgagor's possession shall be his.<sup>(u)</sup> And at the same time his honour said, "It is said that in case of a bond, where for twenty years neither principal nor interest was paid, a jury will of course find it satisfied; and that it were absurd, where a bond is a collateral security for a mortgage, that the bond should be found satisfied, and the mortgage still due. But that would not be the case: for in

(r) 3 Bro. C. C. 291.

(t) See 1 Fonbl. Treat. on

(s) *Humphreys v. Humphreys*,

Equity, 323.

3 P. Wms. 396. *Gatwick v. Simpson*, 2 Atk. 144. *Oswald v. Legh*, 1 Term Rep. 270.

(u) *Leman v. Newnham*, 1 Ves. 51. 2 Cox 122, 123.

an action on the bond, if the jury were not convinced that the mortgage money was paid, they would not find the bond satisfied: but if the Court were satisfied that the money was paid, they would not suffer the mortgagee to bring an action on the bond, which brings it to the question, whether the money was paid or no; and it is certain that nothing has ever been paid. If it stood singly on the twenty years elapsed, and no evidence either way, it would be very difficult for me to determine so large a sum to be satisfied, without putting it in some way to be tried: but there is no evidence of its having been paid, and strong evidence that it never was.” (v)

And, in justice to these observations, it should be remarked that in all those cases where mortgages have been presumed satisfied, there have been other circumstances independent of the length of possession, which have concurred to induce the Court to raise the presumption. In one case the mortgagor had been in possession twenty-five years without paying any money on the mortgage, *though the mortgagee lived within a street of him*; and upon that, the mortgage was considered satisfied. (x) In another, the mortgagor, after remaining in quiet possession for seven years, sold the property, and the purchaser took possession; and, though the mortgagee knew of the change in the possession, he never gave the purchaser notice; and the mortgagee afterwards bought lands of the mortgagor, and paid him money for it; in which case the mortgage was presumed satisfied, though the mortgagor and the purchaser had only had seventeen years’ possession. (y) And in a third, the mortgagor, and those claiming under him, had been in possession sixty years, independent of a con-

(v) *Leman v. Newnham*, 1 Ves. 51.

(x) Case cited by the Lord Chancellor, 12 Ves. 266.

(y) *Sibson v. Fletcher*, 1 Cha.

Rep. 59. That a bond shall be presumed to be satisfied within the twenty years, if there has been an intermediate settlement of accounts,

see 1 Camp. 29.

possession from the defendant five years before, that the mortgage money was paid; upon which the Court decreed that the plaintiff and his heirs shall hold the premises in question against the defendant, and all under him; and that a vacat be entered upon the enrolment of the said mortgage. (z) And, indeed, in these sort of cases the Court will receive any kind of evidence of payment, which will go to strengthen the presumption of payment arising from length of time. And, therefore, if a mortgage was made by one partner to another, and the mortgagor agreed with the other that he should take a certain part of the profits of the partnership in discharge of the mortgage, that of itself would discharge it in due time. (a) And where the presumption of payment can be raised from other circumstances, the mere circumstance of the mortgage deed and bond being in the possession of the mortgagee will not be sufficient to rebut it. (b)

But though there may have been no demand made for payment of the mortgage debt for twenty years and upwards, and though no interest may have been paid during that period, and the mortgagor been in the quiet possession of the lands; yet the presumption of payment, like all other presumptions, is liable to be repelled by evidence to the contrary, as if there has been an acknowledgment of the debt within the twenty years. (c) And where claimants under a mortgagor admitted the original mortgage, and insisted on the statute of limitations, but their denial as to payment of interest was confined only to belief; the Lord Chancellor referred it to the Master to inquire whether any interest had been paid, with leave to examine the parties upon interrogatories. (d)

(z) *Hales v. Hales*, 1 Cha. Rep. 105, S. C. 2 Cha. Ca. 28.

(a) *Barnard*, Cha. Ca. 93.

(b) See the case cited, 12 Ves.

266.

(c) *Toplis v. Baker*, 2 Cox 118.

(d) *Trash v. White*, 3 Bro. C. C.

289.



So, in a case which arose in Ireland, a foreclosure was decreed, notwithstanding the mortgagor had been in quiet possession for twenty-four years; for that the acquiescence on the part of the mortgagee was accounted for from a peculiarity of disposition arising from the death of his only son, which made him averse to attend to this or any other business. And the presumption of payment does not arise where there are any circumstances to account for the acquiescence: besides in the principal case the person to be affected was out of the jurisdiction. And, upon an appeal to the House of Lords, this decree was affirmed. (*e*)

And where the principal money cannot be presumed to be paid, of course the interest cannot. (*f*)

It was said by Lord Chancellor Hardwicke, that if a mortgagee cancels a mortgage, and it is found so in his possession, it is as much a release as cancelling a bond: but it does not convey or revest the estate in the mortgagor, for that must be done by some deed. (*g*)

But whether a mortgage debt can be relinquished by parol it is more difficult to say. In a case before Lord Hardwicke, reported by Barnardiston, (*h*) some strong expressions seem to have been used, tending to shew that the mortgage debt may be forgiven by parol, notwithstanding it is an interest affecting real estate; on the ground that the debt and the land are distinguishable, and that, whenever the debt appears to be satisfied, the interest in the land would follow as a matter of course, for the benefit of the mortgagor, as a case of a trust falling within the exception of the statute of frauds: but this case cannot be supposed to be of any authority, since we find Lord Hardwicke himself, in a subsequent case, noticing it to be a

(*e*) Meade v. Earl of Bandon, 2 520. Co. Lit. 232. a. 232 b. Dow. 268.

(*h*) Richards v. Sims, Barnard.

(*f*) 2 Dow. 268, 269.

90. And see 2 Burr. 978, 979.

(*g*) Harrison v. Owen, 1 Atk.

very slight precedent ; and refusing to decide whether a mortgage debt could pass by parol gift. (*i*) And in a case which happened prior to this, but subsequent to the one cited from Barnardiston, Lord Hardwicke cautiously avoids giving any opinion, whether parol evidence could be admitted to charge the land otherwise than it would be by the rules of equity, saying, “ This is certainly a kind of real right ; being to affect a real estate in all events contrary to the writing, and to rebut the equity.” (*k*) And the present Chancellor has treated it as difficult to say whether a mortgage debt can be effectually relinquished by parol, and without consideration. (*l*)

In consequence of the payment of the mortgage money, the mortgagor has immediately a right to have the mortgage deed delivered into his possession, and to have a receipt indorsed upon the back of it ; and he has also a right, immediately upon such payment, to have the title deeds delivered up to him in order to enable him to prepare a reconveyance of the estate. (*m*) But if the proviso in the mortgage deed says that, on payment of the money, the term shall cease, or that the assurance shall be void, and the money is paid on the day mentioned in the condition, so as to make it a legal performance of the condition, the estate is *ipso facto* void, and there needs no re-assignment : but in such case the receipt on the mortgage deed should be framed with particular care, as to when, where, by whom, and to whom, the mortgage money was paid, as it may very soon constitute the only evidence of the legal performance.

But where a mortgage was made for a term of five hundred years to the mortgagee, with a proviso that on

(*i*) *Hassell v. Tynte*, Amb. 318. Bedford, 17 Ves. 380.

(*k*) *Robinson v. Gee*, 1 Ves. 253. (*m*) 2 Cas. and Op. 53. ante 416.

(*l*) *Monkhouse v. Corporation of*

payment of 500*l.* and interest, on a certain day, the term should cease and be void ; and the following indorsement was made on the mortgage deed, but without any seal or stamp to it, *viz.* “ Received this      day of March, 1738,” (being after the day limited by the proviso,) “ of A. B. so much money for all principal money, and interest, till this day ; and *I do release the said A. B., and discharge the within mortgaged premises from the term of five hundred years,*” which was signed by the mortgagee ; it was resolved by the Court, that the term was surrendered. For, first, before the statute of frauds, a lease for years, either by deed or parol, might have been surrendered without deed by parol ; that the words *release and discharge the term of five hundred years* are much stronger than words which in many cases have amounted to a surrender, *ut res magis valeat quam pereat*. And, secondly, it appears, by the statute of frauds and perjuries, that a lease for any term of years may be created by writing without deed, and that the same may be surrendered by deed or *note in writing*. Vide sect. 3. of that statute. And the Court held that there was no occasion for any stamp duty upon this note or indorsement, it not being a deed.<sup>(n)</sup>

But in an ejectment where a title is made under a mortgage, and particularly if the mortgage is an old mortgage, if evidence is given that the debt is satisfied, this is considered as defeating the estate in the lands which the mortgagee had ; and in such cases the Court will presume that the money was paid at the day, and will direct the jury to give their verdict accordingly, unless it clearly appears that the money could not be paid at the day ; and no writing is necessary in these cases. <sup>(o)</sup>

If it be a mortgage of copyholds, the mortgagee should

<sup>(n)</sup> Farmer dem. Earl v. Rogers, 6 East. 86.

2 Wils. 26. Roe dem. Earl of      <sup>(o)</sup> Barnard. Cha. Rep. 93. And  
Berkeley v. Archbishop of York, see Doe v. Calvert, 5 Taunt. 170.

enter up satisfaction on the court rolls of the manor ; (*p*) and if of an estate in a register county, there should be an entry of satisfaction made in the margin against the memorial of the mortgage. (*q*) And if a judgment was given as a collateral security, the mortgagee should enter up satisfaction on the judgment. (*r*) These acts the mortgagor may require the mortgagee to do : but the mortgagee will be allowed all his expences ; for the payment of the money has reduced the mortgagee to a trustee for the mortgagor. (*s*)

(*p*) Ante 102.

(*q*) Ante 352, 353.

(*r*) 4 Bro. P. C. 451.

(*s*) Barnard. Cha. Rep. 93.

## CHAPTER XII.

## OF FORECLOSURE.

THE mortgagor's equity of redemption, or, in other words, his power in equity to redeem the lands after the condition forfeited at law, may be lost either by length of possession in the mortgagee, by the mortgagor's default to redeem in a bill for redemption, or upon a bill of foreclosure filed by the mortgagee.

Of the first of these modes of losing the equity of redemption we have already had occasion to speak in treating of an equity of redemption.

The second too has been discussed at length. So that here it may be only necessary to call to recollection, that the decree on a bill for redemption is that the mortgagor shall redeem or stand foreclosed; (*a*) and that the default of the mortgagor in redeeming on the day mentioned in the decree is irrecoverable, and loses him his estate; (*b*) and further, that the Court will not on a bill to redeem enlarge the time, as it will on a bill for foreclosure. (*c*)

We have, therefore, now to consider the last of the means above mentioned by which the equity of redemption may be lost, *viz.* by a bill of foreclosure. Which term

(*a*) Dick. 56. 249. 2 Bro. C. C. 2 Atk. 246.

278. 12 Ves. 58, 59.

(*c*) Novosielski v. Wakefield, 17

(*b*) 11 Ves. 199. Garth v. Ward, Ves. 417.

of foreclosure, if it were necessary to our present purpose, we might refer to the relief sought by such a bill, *viz.* of *fore-closing* the mortgagor of his power to redeem the estate before the time, when the mortgagee would otherwise acquire an absolute title by length of possession, unless the mortgagor shall within a reasonable time determine his election by redeeming the estate : for on a bill for foreclosure, as on a bill for redemption, the decree is always in the alternative ; that the mortgagor shall redeem, or that the plaintiff (the mortgagee) shall hold the land against the defendant, (the mortgagor) and all claiming under him. (*d*)

And it is on account of this power in the mortgagor to recover his estate by paying the money, that I have, in the Chapter on Mortgagees, reckoned a bill of foreclosure as one of the means by which equity will assist a mortgagee to recover the capital of his debt. (*e*)

In certain instances it is proper, and in others it seems advisable, instead of a bill for foreclosure, to file a bill for a sale of the estate.

Thus in *Lucas v. Seale*, (*f*) Lord Hardwicke observed, that “ where there are several executors, and one of them is indebted to the testator, for which he had given a security by way of mortgage upon his estate, if the co-executors are apprehensive that he is insolvent, and that the estate may prove a deficient security, bringing a bill against him to foreclose is improper ; because, the testator having made him an executor gives him an interest in the mortgage, the other executors should have brought a bill for sale of the estate.

Independent of the reason reported to have been given

(*d*) 1 Cha. Ca. 218. See the 166. pl. 3.  
decree which was made in that case (*e*) Ante 81.  
in 1656. See also 1 Eq. Ca. Abr. (*f*) 2 Atk. 56.

by Lord Hardwicke in this case why the co-executors should pray a sale, *i. e.* because *the mortgagor being an executor had an interest in the mortgage*, it seems that the prayer of the bill by the co-executors should have been the same, had it rested on the deficiency of the estate only. For, where a mortgage security is deficient, the mortgagee cannot afterwards proceed upon the bond, or other collateral security, without opening the foreclosure. And to pray a foreclosure which the next day is liable to be opened is a mode of relief to which equity would not confine a *bonâ fide* mortgagee, since it is contrary to the first principle of equity to do substantial justice by setting the matter at rest. (g) And against this conclusion no proper ground for argument can be furnished from the case of *Dashwood v. Bithazey*. (h) There the bill was to foreclose, the defendant appeared, and stood in contempt for not answering to a sequestration; and the cause came on upon the sequestration for the bill to be taken *pro confesso*. And the plaintiff prayed a sale, instead of a foreclosure, because the security was defective; and, if they should afterwards sue the defendant on his bond, that would open the decree of foreclosure; and it was insisted that such decrees were usual. But the Master of the Rolls said “ he had never “ known any, but that where the security was defective, “ it was often indeed referred to a Master to set a valuation on the estate: and the plaintiff was to take it pro “ tanto, as in the case of *Homden v. Tilby*, on a bill of “ foreclosure of the shops in Westminster Hall. But in “ this case he decreed a sale, because the decree is that “ the bill should be taken *pro confesso*, and not according “ to the prayer of the bill;” which shews that the Master of the Rolls allowed the propriety of praying a sale where the security was deficient; but thought that it could not

(g) See 13 Ves. 205.

(h) Mosl. 196.

be done in the common case under a bill of foreclosure. And in the same case the case of Nosworthy and Serjeant Maynard was quoted ; where the security being defective, the cause stood over and the plaintiff filed a supplemental bill, and prayed a sale.

And the propriety of praying a sale instead of a foreclosure, where the mortgaged estate is deficient, is, I think, farther confirmed by the following case before Lord Thurlow. A mortgagee in fee filed his bill against the defendant, who was both heir and administrator of the mortgagor, praying an account of the principal and interest due on the mortgage, and *praying a sale* ; and, in case the mortgaged premises should not prove sufficient to pay the principal and interest due, that the deficiency might be made up out of the personal estate ; and, in case the defendant should not admit assets, that there might be an account of the personal estate. The defendant, by his answer, admitted the personal estate was very small, and would be deficient. And the cause coming on before his Honour, he ordered according to the prayer of the bill. From this decree the defendant appealed, because it had not ordered an account of the personal estate in the first instance, or that so much of the estate as should be necessary only should be sold. But the Lord Chancellor thought the decree of course, the heir and personal representative being the same person ; though, if they had been different persons, it would have been necessary first to have an account of the personal estate. And the decree was affirmed. (i) In which case we may observe, that the decree for the *sale* was never questioned. And the Lord Chancellor's reason for thinking that the decree might have been varied, if the heir and executor had not been the same person, is only in favour of the heir who has a right

(i) Daniel v. Skipwith, 2 Bro. C. C. 155.



to have the personal estate in the first instance applied in exoneration of the real.

But from this case we learn that, when the real estate is insufficient to pay the mortgage debt, the mortgagee cannot pray a sale of the estate, without praying an account of the personal estate in the first instance ; unless the same person is both heir and personal representative to the mortgagor.

In Ireland it is the practice to decree a sale instead of a foreclosure : and if the sale produce more than the debt, the surplus goes to the mortgagor ; if less, the mortgagee has his remedy for the difference. (*k*)

If it be a mortgage of a dry reversion, the mortgagee may in the first instance pray a sale ; the reason for which seems to be that a court of equity will not oblige a mortgagee to be out of his money till the falling in of the estate. (*l*)

In *Mackensie v. Robinson*, (*m*) it was said by Lord Hardwicke that a mortgagee of an advowson, instead of bringing a bill of foreclosure, should pray a sale of the advowson ; which observation, as I have elsewhere observed, seems only to have been made with a view to meet the difficulty which may arise by the advowson becoming vacant before the foreclosure is completed. (*n*)

Where the mortgagor becomes bankrupt, the mortgagee may, under Lord Loughborough's general order, come in and pray a sale ; of which we have already had occasion to speak in the Chapter on Mortgagees.

Where the mortgagor dies, and the equity of redemption descends upon an infant, the mortgagee should pray a sale or foreclosure in the alternative ; for the Court will

(*k*) 13 Ves. 205.

(*m*) 3 Atk. 559.

(*l*) *How v. Vignes*, 1 Cha. Rep.

(*n*) *Ante*, p. 111, 112.

not suffer an infant to be foreclosed, when, if the mortgagee will consent to a sale, a surplus may be got for the benefit of the infant. Upon which the Court will refer it to the Master to enquire whether it will be for the benefit of the infant that the estate should be sold. (o) And, although it was, till very lately, thought that a bill of foreclosure was the proper course to be pursued against an infant; and that an infant defendant could not, upon such a bill, have a reference to the Master, to enquire whether a sale would be for his benefit: (p) yet the rule is now as above.

But if upon a bill to foreclose an infant, the mortgagee will not consent to a sale, and the infant either prays a sale, or it appears to the Court that a sale would be beneficial to the infant, it seems that the Court may refuse to foreclose till the infant comes of age. And that the Court has exercised such power of refusal appears from the case of *Sayle v. Freeland and Others*, infants, where the Court would not decree the infants to be foreclosed till they came of age, because the mortgage in that case depended upon a disputable title; and so no money could be expected upon assignment of it over. (q)

So where one made a mortgage by lease and release of copyhold premises, with a covenant for farther assurance, upon a bill filed by the mortgagee against the customary heir of the mortgagor, who was an infant, to surrender the copyhold premises, and for a foreclosure; the Master of the Rolls held the infant bound by the covenant to assure: but would not direct him to make good the mortgage by surrendering the premises, or decree a foreclosure against him till 21. (r)

(o) *Monday v. Monday*, 1 Ves. 83.  
 and *Bea.* 223. *Booth v. Rich*, 1 (q) 2 Ventr. 350.: and see  
*Vern.* 295. And see *Adams v. Gould*, *Spencer v. Boyes*, 4 Ves. 370.  
 2 Dick. 443. (r) *Spencer v. Boyes*, 4 Ves.  
 (p) *Goodier v. Ashton*, 18 Ves. 370.

Where a sale is directed of mortgage premises, upon a bill by the mortgagee, it seems that the Court will give the infant a day to shew cause against the decree, after he attains 21. In the case of *Adams v. Gould*, before Lord Bathurst, the bill was filed by infants, who were devisees under a will, for a sale of the estates. Some of the defendants claimed under a forfeited mortgage of copyholds; and the decree directed a reference to be made to the Master to take an account of the testator's debts; and if the personal estate was insufficient, "then it was further ordered, by the consent of the said defendants, the mortgagees, that the said mortgaged premises be sold, with the approbation of the said Master, to the best purchaser or purchasers that can be got for the same; and all deeds and writings in the custody or power of any of the parties relating thereto are to be produced before the said Master upon oath. And all proper parties, and the plaintiffs, the infants, when they shall attain their age of 21 years, are to join in such sale as the said Master shall direct, *unless* the said plaintiffs, the infants, on being served with a subpoena for that purpose, shall, within six months after they shall attain the said age of 21 years, *shew unto this Court good cause unto the contrary*; and such purchaser or purchasers is or are in the mean time to hold and enjoy the said premises against the plaintiffs, the infants, and all persons claiming by, from, or under them, or either of them." (s) And from Dickens' report of this case, it appears, that the liberty allowed to the infants to shew cause against the decree, was a point that was much considered. (t) In this case we may observe that the infants were plaintiffs, and yet had a day to shew cause: the case, therefore, is much stronger where an infant is made a defendant. Indeed, the rule is, that an infant defendant

(s) Reg. Lib. A. 1770. fol. 646. (t) *Adams v. Gould*, 2 Dick. 443.

shall always have a day to shew cause against the decree, within six months after arriving at full age ; and a decree omitting that provision would be erroneous. (*u*) Though in *Monday v. Monday*, (*x*) where Lord Eldon referred it to the Master to enquire whether a sale would be for the benefit of the infant, and the Master found that it would, his Honor the Master of the Rolls confirmed this report, and ordered that the estate should be sold, *wherein all proper parties were to join*. (*y*) But no day was given to the infant to shew cause against the decree.

A decree of foreclosure may be had against an infant : but in all such cases the infant has six months' time, after he comes of age, to shew cause against the decree. But, though he may shew cause against the decree, yet the infant cannot, when he comes of age, ravel into the account ; nor is he so much as entitled to redeem the mortgage, by paying what is reported due ; but is only entitled to shew an error in the decree. (*z*) So that, except this power of shewing error, which the infant has, he is foreclosed to all intents. And the mortgagee has such a title that he may go to market with it ; and the purchaser is only liable to be overhauled in the account. (*a*) For the proposition, that the infant cannot ravel into the account must be taken with this limitation, *viz.* that there be no fraud or error in the account. (*b*) But, as we have already seen, the Court will not at this day decree a foreclosure against an infant, if a sale is more for his benefit. (*c*)

(*u*) *Savage v. Carroll*, 1 Ball and Bea. 551. *Gilb. For. Rom.* 160.

(*x*) 1 Ves. and Bea. 223.

(*y*) *Lib. Reg. B.* 1816. fol. 1326.

*S. C. Lib. Reg. B.* 1817. fol. 958.  
An order confirming the sale.

(*z*) 3 P. Wms. 352. and *Lyne v. Willis*, in note B. there. *Richmond v. Taylor*, 1 Dick. 38.

(*a*) 3 Ves. 317.

(*b*) Ante 155.

(*c*) *Monday v. Monday*, 1 Ves. and Bea. 223.

The words of the decree against an infant are these, viz. " And this decree is to be binding on the defendant " J. A., the infant, unless he, on attaining his age of 21 " years, upon being served with a subpœna to shew cause " against the same, shall, within six months after he shall " attain such age, shew unto this Court good cause to " the contrary." (*d*) This process is by way of subpœna, to be served on the defendant at his coming of age; and it is a judicial writ, and must be returned in term time. If he shews no cause, the decree is made absolute upon him. (*e*)

But when he comes of age and shews cause, within the six months, he may, upon motion, put in a new answer, and make a new defence; and, by consequence, examine witnesses anew to prove his defence. (*f*)

But the infant is not obliged to wait till twenty-one to put in a new answer, but may do it before. (*g*)

Where upon a decree of foreclosure the infant had a day to shew cause; and, before he was served with a subpœna to shew cause against the decree, left the kingdom; Lord Thurlow would not allow a service of the subpœna upon his clerk in Court to be a good service; but thought that it must be personal, or that it should be fully proved that he had left the kingdom, or had absconded to avoid the service. Afterwards an affidavit having been made that the defendant was greatly indebted to divers persons, and that he had declared it was his intention to leave the kingdom to avoid his creditors, the Lords Commissioners, without the least hesitation, granted the motion. (*h*)

(*d*) Taken from the decree in *Wms.* 401. *S. C.* 3 *Bro. P. C.* 301.  
*Goodier v. Ashton*, 18 *Ves.* 83. *Fountaine v. Caine*, 1 *P. Wms.* 504:  
*Lib. Reg. A.* 1810. fol. 1217. *Mos.* 66. 306, 313.

(*e*) *Gilb. For. Rom.* 160.

(*g*) *Bennet v. Lec*, 2 *Atk.* 531,

(*f*) *Gilb. For. Rom.* 160, 161. 532.

*Napier v. Lady Effingham*, 2 *P.* (*h*) *Elcock v. Glegg*, 2 *Dick.* 764.

The case of a feme covert is different from that of an infant; for she may be absolutely foreclosed, and shall have no day given to her or her heirs to redeem after the coverture determined. (*i*)

If the mortgagee takes his security by a defective conveyance, the Court will not make good the defect or decree a foreclosure, as against an infant entitled to the equity of redemption: but it seems that the decree in such case will be that the defendant do pay to the mortgagee what the master shall report due within six months after, or in default that the mortgagee shall enjoy the mortgaged premises, as against the defendant, until he shall attain the age of twenty-one years; and that upon his attaining the age of twenty-one years the defendant shall convey the premises to the plaintiff, unless, upon being served with a subpœna, he shall, within six months afterwards, shew cause to the contrary. (*k*) But, as against adults, the Court will decree them to redeem, or stand foreclosed, and execute all proper conveyances of the mortgaged premises to the plaintiff and his heirs. (*l*)

If the mortgagor be attainted of treason, the Court of Chancery will not decree a foreclosure against the crown, but will direct that the mortgagee shall hold and enjoy the premises till the crown thinks proper to redeem. (*m*)

No decree of foreclosure is necessary upon a mortgage of stock: but the mortgagee may, at any time after the condition forfeited, sell the stock, and repay himself the

See the act 5 Geo. 2. c. 25. *Carter v. De Brune*, 1 Dick. 39. *Hyde v. Forster*, 1 Dick. 102. *Wellings v. Lomans*, 2 Dick. 579.; and the Irish act 7 Geo. 2. c. 14. 2 Scho. and Lef. 282. note. For service of subpœna and relief of mortgagees, where the mortgagor absconds, or is out of the jurisdiction of the Court.

(*i*) *Mallack v. Galton*, 3 P. Wms. 352. S. C. Dick. 65.

(*k*) *Spencer v. Boyes*, 4 Ves. 370. *Sayle v. Freeland*, 2 Vent. 350.

(*l*) *Pye v. Daubuz*, 3 Bro. C. C. 595. S. C. 2 Dick. 759.

(*m*) *Lutwich's case*, cited 2 Atk. 223.

money. And, if the stock should afterwards rise in value, the mortgagor cannot come for a redemption, and insist upon having the stock replaced. (*n*)

A mortgagee cannot bring a bill of foreclosure till after the condition forfeited at law; for till that time the mortgagor's estate is not turned to an equity of redemption, and he is at liberty to redeem by the express agreement of the parties at law. (*o*)

And, therefore, upon a Welch mortgage there can be no foreclosure, because there can be no forfeiture of the condition. (*p*) But if a mortgage be made on the 25th of December, 1820, with a condition that the mortgagor shall be at liberty to redeem, on paying half a year's interest on the 24th of June following, and the principal and another half year's interest on the 25th of December, 1821, and the mortgagor makes default in paying the interest on the 24th of June, the mortgagee may immediately proceed to a foreclosure; for one default is a forfeiture of the condition, and makes the estate absolute in the mortgagee. (*q*)

But a mortgagee may bring his bill for a foreclosure before he has taken possession of the mortgaged premises; and, after he has obtained a decree to foreclose, he may bring his ejectment for the possession of the estate. So upon a mortgage of copyholds the mortgagee may bring his bill to foreclose before admittance. (*r*) And if the mortgage surrender has become void for want of a timely presentment, the decree will direct the defendant, in case of a foreclosure, to surrender the mortgaged premises at the expence of the plaintiff. (*s*)

(*n*) *Tucker v. Wilson*, 1 P.Wms. Price, Gilb. 106. S. C. 1 P.Wms. 291.  
259. *Lockwood v. Ewer*, 2 Atk. (*q*) *Stanhope v. Manners*, 2 Eden.  
303. But see these cases, and 15 197. *Gladwin v. Hitchman*, 2  
Vin. 476. pl. 7. Vern. 135.

(*o*) 1 Vern. 232. 2 Ventr. 365. (*r*) *Sutton v. Stone*, 2 Atk. 101.

(*p*) 1 Ves. 407. *Howell v.* (*s*) *Hill v. Price*, 1 Dick. 344.

And a mortgagee may pursue all his remedies at once as bring an action on the covenant to repay, an ejectment to recover the possession, and a bill to foreclose the redemption at the same time. *(t)* But he cannot have the estate and the money too.

If an estate is conveyed by way of mortgage to A., as a trustee for B., B. cannot bring a bill of foreclosure without making the trustee a party; for it is the legal estate of the trustee that is to be protected by the decree of foreclosure, and he is a necessary party to the reconveyance if the mortgagor should redeem. And, therefore, where a mortgagee *cestui que trust* omitted to make the trustee a party, the Vice-Chancellor ordered the cause to stand over, with liberty to amend by adding parties; and the plaintiff was to pay the costs of the day. *(u)*

But where trustees laid out the money of different *cestuis que trust* upon a mortgage, which they took in their own names, a foreclosure was permitted by one *cestui que trust* as to his share; the trustees having refused to assist the plaintiff in recovering his money, and being made defendants in the cause. *(x)*

But in a prior case, where a mortgagee assigned over the mortgage to a trustee in trust for three persons, who contributed equal proportions of the money, and one of the three filed a bill to foreclose, the Lord Chancellor said it was a new case in respect of their being *joint* tenants; and that it would be impossible for one to foreclose without joining the other two parties. The cause, therefore, stood over for that purpose. *(y)*

*(t)* Rees v. Parkinson, 2 Anstr. 186.

497. Dougl. 417. 2 Ves. 678.  
2 Atk. 343. Sometimes the Court  
will grant injunction to stay pro-  
ceedings at law. Ante 85, 86.

*(u)* Wood v. Williams, 4 Mad.

*(x)* Montgomerie v. The Marquis  
of Bath, 3 Ves. 560.

*(y)* Lowe v. Morgan, 1 Bro. C.C.  
368.



Which two cases it seems difficult to reconcile upon the ground given by the Lord Chancellor, in the case last noticed ; *viz.* of the assignees of the mortgage having been *joint* tenants ; for, if two persons advance money in the same or different proportions upon a mortgage, they are nevertheless tenants in common in equity. (z)

If the heir of the mortgagee bring a bill to redeem, or else be foreclosed, it will be a good cause for demurrer, that the executor of the mortgagee, who may have title to the money, is no party to the suit. (a) So if at the hearing it comes out that the executor of the mortgagee is not a party, the plaintiff (heir of the mortgagee) will not be admitted to proceed. (b)

But it seems that if the heir of the mortgagee alone exhibit a bill, and obtain a foreclosure, the mortgagor cannot afterwards be let in to redeem. (c)

The devisee of the mortgagee, who is entitled both to the land and money, need not make the heir of the mortgagee a party to the bill to foreclose. (d) Which rule is so unalterably settled that where the devisee of a mortgagee, who devised to him both the mortgaged premises and the money due thereon, filed a bill to foreclose, and made the heir of the mortgagee a defendant to have the will established against him, Lord Kenyon, the Master of the Rolls, in directing the account, would not allow the estate to be burthened with the costs of the heir of the mortgagee, he being made a party by reason of the act of the mortgagee in the disposition of his estate. (e)

From the case of *Wood v. Williams*, (f) above cited, it

(z) 2 Ves. 258. 3 Ves. jun. 631. 66.; and see *Gobe v. Earl of Carlisle* there cited.

(a) *Freak v. Harsey, Horseley, or Horsey*, 1 Cha. Ca. 51. 2 Freem. 180. Nels. C. C. 93. (d) *How v. Viguers*, 1 Cha. Rep. 33. 1 Eq. Ca. Abr. 318. pl. 5.

(b) *Meeker v. Tanton*, 2 Cha. Ca. 29. (e) *Skipp v. Wyatt*, 1 Cox 353. (f) 4 Mad. 186.

(c) *Clerkson v. Bowyer*, 2 Vern.

stands to reason that the executor of a mortgagee in fee cannot file a bill to redeem or be foreclosed without making the heir of the mortgagee a party ; because, if the mortgagor should redeem, there must be a reconveyance, and the mortgagor may take the objection at the hearing.

A sub-mortgagee cannot file a bill to foreclose the original mortgagor without making his own mortgagor a party : as if A. makes a mortgage to B. for five hundred years, for securing 350*l.* and interest, and B. assigns the term to C., redeemable by himself on the payment of 300*l.*, C. cannot bring a bill to foreclose A. without making B. or his representative a party ; for B. has a right to redeem C., and to prevent another account as to what was due upon the original mortgage. And the assignment to C. having been made twenty-six years before the bill brought by him to redeem A., will make no difference. (*g*)

But if the mortgagee assign the mortgaged premises and the money absolutely, the assignee may foreclose without making the mortgagee a party ; although the mortgagor states in his answer that the assignee has paid the mortgagee more than is due on the mortgage ; for, if that should appear on taking the account, the assignee could not be allowed it. (*h*)

A mortgagee in fee, seeking to foreclose the equity of redemption, need not bring the personal representatives of the mortgagor before the Court : but the heir of the mortgagor must be made a defendant. For the bill being to foreclose the equity, the plaintiff need make him only a party who has the equity, *viz.* the heir, and the course is so. Neither is the plaintiff, the mortgagee, any ways bound to intermeddle with the personal estate of the mortgagor, or to run into any account thereof. And if the heir would have the benefit of any payment

(*g*) *Hobart v. Abbot*, 2 P. Wms. 643.

(*h*) *Call v. Mortimer*, 8th July, 1791. 9 Ves. 268, 269.

made by the mortgagor or his executor, he must prove it. (*i*)

So if a person seized in fee make a mortgage for a term of years, redeemable by himself, his heirs, *executors*, or *administrators*, the mortgagee need not make the personal representative a party to a bill to foreclose. Nay, he ought not : for, if he does, the personal representative may have the bill dismissed as against him, and most probably with costs. (*k*)

But in a bill for sale the personal representative of the mortgagor must be a party as well as the real, for the personal estate must be applied before the Court will decree the real estate to be sold. (*l*)

Where there is one mortgage of freehold and of leasehold estates, and the mortgagor dies, both heirs and executors must be parties to a bill of foreclosure. (*m*)

If the mortgagor become a bankrupt, he is not a necessary party ; it is sufficient to bring the assignees before the Court. (*n*)

A mortgagee must make all subsequent incumbrancers upon the equity of redemption, who have obtained their securities subsequent in point of time to the mortgage, but previous to the filing of the bill, parties to a bill of foreclosure. (*o*) And if, in order to bring the personal representatives of a subsequent incumbrancer before the Court, the mortgagee is obliged to procure a person to take out letters of administration to him, the mortgagee

(*i*) *Duncombe v. Hansley*, 3 P. Wms. 333. note A. *Fell v. Brown*, 2 Bro. C. C. 279.

(*k*) *Bradshaw v. Outram*, 13 Ves. 234. Bill dismissed against the executrix, and, *by consent*, without costs.

(*l*) *Daniel v. Skipwith*, 2 Bro. C. C. 155. *Fell v. Brown*, 2 Bro.

C. C. 276. Ante, 197.

(*m*) *Robins v. Hodgson*, at the Rolls, 15th Feb. 1794, cited in *Harr. Cha. Prac.* 30.

(*n*) *Adams v. Holbrooke*, MSS. *Harr. Cha. Prac.* 30.

(*o*) *Godfrey v. Chadwell*, 2 Vern. 601. *Morret v. Westerne*, 2 Vern. 663. 2 *Freem.* 14.

will be allowed the costs of that administration ; for the original mortgagor, by parcelling out the equity of redemption, occasioned the necessity for it. (*p*)

But the case of the Bishop of Winchester *v.* Beavor, before Lord Alvanley, (*q*) should here be noticed. Upon a bill of foreclosure the defendants objected that a subsequent judgment creditor was not made a party. The usual and common practice, almost without exception, is, to make all incumbrancers parties. But, said his Honour, “if I lay down that it is absolutely necessary, I arm a man with a shield to ward off a foreclosure. But the question is, whether it is not proper in this case. I think it would be too much to refuse it, where there is no affectation of delay that I can see. I do not think the general point so clear as to determine it upon this case. I hope the Court is not bound to insist upon all incumbrancers being parties : but I am perfectly satisfied that in this case it is by much the least evil to order the cause to stand over till *this single* incumbrancer is made a party.” And the principal reason for making all subsequent incumbrancers parties is, the gross injustice that would arise if the Court might compel the mortgagee to reconvey the legal estate to the mortgagor, where it appears that he has no right to it ; and which legal estate he might use to keep off the intervening incumbrancers. (*r*)

But if, after a bill filed by the first mortgagee to foreclose, the mortgagor confesses judgments, (*s*) or mortgages to second mortgagees, (*t*) or assigns the equity of redemption, (*u*) the plaintiff mortgagee need take no notice of such subsequent incumbrancers ; and they will be bound, notwithstanding they were no parties to the suit.

(*p*) Hunt *v.* Fownes, 9 Ves. 70.

(*q*) 3 Ves. 317.

(*r*) 3 Ves. 316.

(*s*) 3 Ves. 315. 11 Ves. 198.

(*t*) Bishop of Winchester *v.*

Payne, 11 Ves. 194.

(*u*) Garth *v.* Ward, 2 Atk. 175.

11 Ves. 199.

Insomuch that where a purchaser took an objection to a title, that two mortgagees, become such after the bill filed, were made no parties to the foreclosure, the exception was disallowed, and the purchaser had to pay costs. (*v*)

From these cases it appears that the case of *Crisp v. Heath*, (*w*) stated by Mr. Viner, is not law now.

But if the mortgagee, who brings a bill of foreclosure, has not the legal estate, and the mortgagor during the pendency of the suit conveys it away, the mortgagee, in order to avoid such conveyance, might be put to a new suit. (*x*)

If a mortgagee omits to make any of the incumbrancers who have become such after the making of his mortgage, and before the filing of his bill, parties to the bill of foreclosure, and obtains a decree of foreclosure, such of the incumbrancers as were not defendants in the suit may open the foreclosure, and be let in to redeem. (*y*)

But in such case such of the incumbrancers as were parties to the suit will be bound by the decree of foreclosure. (*z*)

If a bill be filed by the creditors of a mortgagor for sale of his estate, and the mortgagee, pending such suit, forecloses, without making the creditors parties, the foreclosure will not be binding upon the creditors, but they may be let in to redeem. (*a*)

If a mortgagor, after having made the mortgage, devises or settles the equity of redemption to various uses, the mortgagee need not make all the remainder-men parties

(*v*) *Bishop of Winchester v. Cox*, 2 Freem. 14. S. C. 3 Cha. Rep. 83.  
Payne, 11 Ves. 194.

(*w*) 7 Vin. Abr. 52. pl. 2.

(*x*) 11 Ves. 199. 4 Dow. 435.

(*y*) *Godfrey v. Chadwick*, 2 Vern. 601. *Morret v. Westerne*, 2 Vern. 663.

(*z*) *Sherman v. Cockes, or Cox*, 2 Freem. 13. S. C. 2 Vern. 518.

Nels. 71.

(*a*) *Soley v. Salisbury*, 9 Mod. 153.

to the bill to foreclose: but it will be sufficient if the first tenant in tail, and the persons having interests under limitations prior to his estate-tail, be before the Court. (*b*) And a decree to foreclose the tenant-in-tail will be binding, not only upon his issue, but also upon all the remaindermen. (*c*)

And if, instead of the decree for foreclosure being made absolute upon the tenant in tail, the tenant in tail releases the equity of redemption to the mortgagee, such release will be considered equal to an absolute foreclosure by order, and will be binding upon the remaindermen. (*d*)

And though in a general way, where there is a tenant for life, the remainder-man also ought to be a party. (*e*)

Yet if the tenant in tail in remainder is abroad, and out of the jurisdiction of the Court, and the plaintiff chooses it, the Court will decree a foreclosure against the parties that are before the Court. But such a decree would not relieve the mortgagee from keeping accounts of the rents and profits, because the tenant in tail might compel an account over again whenever he thought fit. (*f*)

In the case of *Roscarrick v. Barton*, (*g*) it is true, that a foreclosure obtained against a tenant for life only was held binding upon a remainderman in tail. But that case occurred in the 24th of Charles the Second, and cannot, as it is presumed, be supposed to be law at this day. (*h*)

The time which the defendant has upon all bills of fore-

(*b*) 1 Dow. 31. Ante, 196.

(*e*) 2 Atk. 101.

(*c*) *Roscarrick v. Barton*, 1 Cha. Ca. 217, 220, and in the margin there. S. C. cited 3 Cha. Rep. 85, 86. 2 Atk. 101. *Yates v. Hambly*, 2 Atk. 237. *Reynoldson v. Perkins*, Amb. 564.

(*f*) *Fishwick v. Lowe*, 1 Cox. 411.

(*g*) 1 Cha. Ca. 217. S. C. cited 3 Cha. Rep. 86.

(*h*) See *Fishwicke v. Lowe*, 1 Cox 411. 2 Atk. 101. 237. Amb.

(*d*) *Reynoldson v. Perkins*, Amb. 564.

closure to redeem, or be foreclosed, is computed according to calendar, and not lunar, months. (*i*)

The time allowed to a mortgagor to redeem upon a bill of foreclosure may be enlarged several times; and has been enlarged even to a fourth time; and that notwithstanding the preceding order was peremptory, if the mortgagor can shew good cause: and the estate being worth more than the incumbrance upon it, will be considered a sufficient reason to make such further order. (*j*)

And though the decree for foreclosure has been signed and enrolled; yet, if it appears that there was no wilful default on the part of the mortgagor, and there is new matter subsequent to the decree, the Court, it seems, would open the decree for foreclosure. (*k*)

If the defendant upon a bill of foreclosure refuses to produce the title deeds, it seems to be a good reason to enlarge the time to redeem. (*l*)

Where an order has been made under the 7th Geo. II. c. 20. s. 2. a further order may be made to enlarge the time to redeem; for the latter words of the act put it exactly in the same situation as if the cause had been brought to a hearing. And one of the intents and purposes must be to give the Court this jurisdiction. (*m*)

If a mortgagor disputes the right of the mortgagee to the money; but the mortgagee nevertheless obtains a decree of foreclosure; the Court cannot, upon motion, suspend the execution of the decree until six months after an appeal shall be heard: but will allow the mortgagor six months from the time fixed by the Master's report,

(*i*) Anon. Barnard. C. C. 324. 61. S. C. 1 Cha. Rep. 253.—  
S. C. 2 Eq. Ca. Abr. 605. pl. 38. Ismoord v. Claypool, 1 Cha. Rep.

(*j*) Anon. Barnard. C. C. 221. 262.  
S. C. 2 Eq. Ca. Abr. 605. pl. 37. (*l*) Anon. Mosl. 246.

Edwards v. Cunliffe, 1 Mad. 287. (*m*) Wakerell v. Delight, 9 Ves.

(*k*) Cocker v. Bevis, 1 Cha. Ca. 36.

upon his consenting to the appointment of a receiver, and paying the plaintiff the interest due from the time of filing the bill, and the costs, upon his undertaking to repay, if the decree shall be reversed. (*n*)

Upon a motion for further time to redeem a mortgage, and that it should stand as a security only for what was *bonâ fide* advanced, but forfeited as to what was won at play, Lord Chancellor Hardwicke thought that, as Mr. Fleetwood in a former cause, where he might have done it, did not insist upon a redemption, the foreclosure could not regularly be kept open: but on the whole circumstances his Lordship allowed three months. (*o*)

A decree for foreclosure is not complete till the final order. Therefore, where to a bill to redeem the defendant pleaded a decree of foreclosure, with averment, of non-payment of the money, but there was no final order for foreclosure, the decree was an old one; yet the plea could not stand for want of a final order. (*p*)

But a release of the equity of redemption by the mortgagor to the mortgagee after the decree is equal to an absolute foreclosure by order. (*q*)

If the mortgagee loses any of the title deeds, this circumstance, as it seems, would not be a good ground to refuse a foreclosure; but an inquiry would be directed to ascertain what was become of the title deeds. (*r*)

The Court of Chancery, it seems, will not, in decreeing a foreclosure, point out what title the mortgagor shall make: but only decree him to redeem, or make a good title to the mortgagee, and execute all proper assurances. (*s*)

(*n*) *Monkhouse v. Corporation* 564.  
of Bedford, 17 Ves. 380.

(*o*) *Fleetwood v. Jansen*, 2 Atk.  
467.

(*p*) *Jones v. Kenrick*, 2 Ves.  
450. cited by Lord Hardwicke, C.

(*q*) *Reynoldson v. Perkins*, Amb.

(*r*) *Stokoe v. Robson*, 3 Ves.  
and Bea. 51.

(*s*) *Sutton v. Stone*, 2 Atk. 101.

Per Mr. Justice Wright. *Pye v.*  
*Daubuz*, 3 Bro. C. C. 598. *Anon.*  
2 Cha. Ca. 244.



But if the mortgagor has the legal estate, the Court would decree him to convey it to the mortgagee. (*t*)

Any act which may be necessary to complete the title of the mortgagee in case of, or after, a foreclosure, he must be at the expence of. (*u*)

There are three different cases in which a foreclosure may be opened :—

1st. If a mortgagee, after the foreclosure, brings an action on the bond for the mortgage money, such action opens the foreclosure, though the decree be signed and enrolled ; and lets in the mortgagor to his redemption. (*x*)

But what if a mortgagee after the foreclosure sells the estate, and then brings an action for the residue. In this case, it appears, that if the mortgagee sold the estate fairly, and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due ; and to the extent of what it did not, the mortgagee has a right to bring an action against the mortgagor, to recover the deficiency : (*y*) and it would be inconsistent to say that the foreclosure would be opened, since the relief sought is to bring in only the *remainder* of the money. (*z*) And it would be immaterial whether the mortgagee, in seeking to recover the residue, brought his action upon the bond ; in which case the action must be for the whole money, or upon the covenant, laying his damages for the remainder of the money. (*a*)

(*t*) *Pye v. Daubuz*, 3 Bro. C. C. 595. S. C. 2 Dick. 759.

(*u*) *Hill v. Price*, 1 Dick. 344.

(*x*) *Dashwood v. Blythway*, 1 Eq. Ca. Abr. 317. pl. 3.

(*y*) *Took v. Hartley*, 2 Dick. 785.

(*z*) *Perry v. Barker*, 8 Ves. 530, 531. S. C. when it came before

Lord Erskine. 13 Ves. 198. went off on a different ground.

(*a*) 8 Ves. 530. But see *Tooke v. Hartley*, 2 Bro. 125. S. C. 2 Dick. 785. The correctness of which report is confirmed by the different notes of the same case, cited by Mr. Belt in his edition of Brown. Ante, 233.

But a bill of revivor is not of itself any waiver of a foreclosure. And, therefore, if a mortgagee after the foreclosure brings a bill of revivor to review the former proceedings, and to have an account of the assets of the mortgagor, and thereout to have satisfaction of a bond given as a collateral security with the mortgage, without either waiving the foreclosure or suggesting a deficiency, it will be sufficient if the defendant pleads the former decree in bar. (*b*)

2dly. If there be a first and second mortgagee, and the first mortgagee exhibits his bill against the second, and forecloses him; yet if the lands afterwards come to the mortgagor, as suppose the first mortgagee devises them to him, the second mortgagee may come against the mortgagor, and be let in to his security notwithstanding the foreclosure obtained by the first mortgagee. (*c*)

3dly. A foreclosure may be opened, if the mortgagee has been guilty of any fraud or collusion in obtaining the decree. (*d*)

But the mortgagees consenting to examine witnesses upon a motion by the mortgagor for further time to redeem, after the estate having been foreclosed by non-payment of the money according to a former order, is not of itself a sufficient ground to open the foreclosure. (*e*)

Nor is a decree of foreclosure liable to be opened for want of mere matter of form in obtaining the decree; especially if the application to set it aside be not made till twenty years afterwards. (*f*)

(*b*) Birch's case, Gilb. 186.

Walk. 197. Lloyd v. Mansell, 2

(*c*) Cook v. Sadler, 2 Vern. 235.

P. Wms. 73.

S. C. 1 Eq. Ca. Abr. 317. pl. 2.

(*e*) Lant v. Crispe, 2 Bro. P. C.

(*d*) Burgh v. Langton, 15 Vin.

111.

476. pl. 2. at the bottom. S. C. 2

(*f*) Jones v. Kenrick, 3 Bro. P.

Eq. Ca. Abr. 609. pl. 5. 2 Bro. P.

C. 315. S. C. 2 Eq. Ca. Abr. 602.

C. 544. Gore v. Stackpole, 1 Dow.

pl. 31. S. C. 15 Vin. 470. pl. 18.

18. Harvey v. Tebbutt, 1 Jac. and

So a decree of foreclosure will not be set aside on account of overvalue in the estate, or by reason of any *parol* agreement or declaration from the mortgagee that the mortgagor shall be at liberty to redeem, notwithstanding the foreclosure. (g)

In like manner, a decree of foreclosure will not be set aside, because the mortgagee has received more than his debt out of the rents of the estate. (h)

And the mortgagee having devised the estate as a *debt*, or *money*, is not a sufficient ground to open a foreclosure. (i)

(g) *Whishall v. Short*, 7 Vin. 398. pl. 15. S. C. 2 Eq. Ca. Abr. 177. pl. 1. S. C. 1 Bro. P. C. 414. 1 Cha. Ca. 218.

(h) *Mallock v. Galton*, 1 Dick. 65.

(i) *Took v. Bishop of Ely*, 1

Bro. P. C. 119. S. C. 2 Eq. Ca. Abr. 608. pl. 1. S. C. 15 Vin. 476. pl. 1. in marg. *Silberschildt v. Schiott*, 3 Ves. and Bea. 45. *Stuckville v. Dolben*, cited Sel. Cha. Ca. temp. King. 10.

## APPENDIX.

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### No. I.

FRERE v. MOORE AND OTHERS. (a)

*Gray's Inn Hall, July 8th, 1820.*

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**BY** indenture, dated the 17th of October, 1786, one moiety of the prebend of Basham, otherwise Bartonsham, belonging to the cathedral church of Hereford, was assigned to Wm. Bird, by way of mortgage, for securing 1250*l.* and interest; and by a declaration of trust, indorsed upon the same indenture, Bird declared himself a trustee of the mortgage money for Howarth Cooke.

In 1796, the sum of 1250*l.*, secured to Cooke, was reduced to 1000*l.*

The lease of the premises was annually renewed in the name of Wm. Bird, while he lived; and after his decease, which happened in August, 1795, in the name of his son Thos. Bird till Sept. 1806.

Sometime previous to Sept. 1806, Thos. Moore became entitled to the entire interest in the prebend, *viz.* as to the moiety subject to Cooke's mortgage in his own right, and as to the other moiety in right of his wife.

By indenture, dated the 12th of October, 1806, Thos. Bird, and Moore and his wife, assigned the moiety which was subject to Cooke's mortgage to Anthony Frere by way of mortgage for securing 1460*l.* and interest.

In 1807 the old lease, which had always been for years, was surrendered, and a fresh lease granted to Thos. Bird for three lives.

By indenture, dated 14th of May, 1813, and made between Thomas Moore and Elizabeth his wife, of the first part; Anthony Frere, of the second part; and Thomas Bird, of the third part. Bird covenanted with A. Frere, and with Moore and his wife respectively, to stand possessed of the prebend and premises, subject as to a moiety to Cooke's mortgage, in the first place, for securing to A. Frere, the repayment of 2900*l.* (*which sum was composed of money due to him on his former security, and a further advance*), and interest, and subject thereto in trust for such persons, and upon such trusts, &c. as Moore and his wife should appoint; and subject thereto in trust for Moore for life, remainder in trust for Eliza. Moore for life, remainder in trust for the executors, administrators, and assigns of Moore.

By indenture dated the 30th of December, 1816, and made between Moore and his wife of the first part, Hudson and Fellows of the second part, and Thos. Bird of the third part. Moore and his wife appoint the prebend, (subject as to a moiety to 1000*l.* due to Cooke, and subject as to the entirety to the sum of ——*l.* (*for which a blank was left*) due to the representatives of Anthony Frere,) to Hudson for securing 1200*l.*; and by the same indenture Hudson declares that 200*l.*, part of the 1200*l.*, is the proper money of Fellows.

By indenture dated the 14th of February, 1817, and made between Moore and his wife of the one part, and Thos. Frere the plaintiff in the cause of the other part, after reciting that there was due on the above mentioned security to A. Frere, the sum of 271*l.* 16*s.* 6*d.* and also reciting that Moore was indebted to the said Thomas Frere, as executor of the said Anthony Frere, in the sum of 178*l.* 13*s.* on two promissory notes, one of them dated the 12th of April, 1816, and the other the 6th of June, 1816; and that Moore was also indebted to the plaintiff as legatee and executor under the will of his late sister in the sum of 264*l.* 2*s.* 6*d.* on a certain bond dated the 25th of June, 1808, and that the said Moore was also indebted to the plaintiff in the sum of 1696*l.* 14*s.* on two bonds, one dated the 12th of November, 1814, and the other the 6th of June, 1815. And that he was also indebted to the plaintiff in 23*l.* 5*s.* 6*d.* on the balance of account for monies paid, which said sums of 178*l.* 13*s.*, 264*l.* 2*s.* 6*d.*, 1696*l.* 14*s.*, and 23*l.* 5*s.* 6*d.*, amounted together to 2162*l.* 15*s.* It is witnessed that Moore and his wife appoint that Bird shall stand possessed of the premises, subject as to a moiety to Cooke's mortgage, in trust for Thomas Frere, and for securing him the payment as well of the sum of 2162*l.* 15*s.* with interest, as the sum of 271*l.* 16*s.* 6*d.* and interest. And it was thereby covenanted, that if the money was unpaid on the 14th day of August then next, the plaintiff might enter and sell the premises.

The bill prayed that the trusts of the indentures of the 14th of May, 1813, and the 14th of February, 1817, might be performed; that the premises might be sold; that an account might be directed of what was due to the defendants, (the personal representatives of Cooke,) and to the other defendants, upon security of the said prebend and premises and that the respective priorities of the plaintiff and of the said last named defendants might be ascertained; and particularly that the plaintiff might be declared entitled to tack his two securities of the 14th of May, and 14th of February, and to be paid, both such securities in preference to the defendants Hudson and Fellows, in respect of the securities holden by them.

It appeared that Hudson and Fellows, though they had notice of An-

thony Frere's security from the blank in the deed of the 30th of Decr. 1816, yet neglected to enquire the extent of it. It appeared also that the plaintiff had no notice of Hudson and Fellows's security at the time of taking his security in 1817.

Mr. Martin and Mr. Wilbraham for the plaintiff.

Mr. Jervis and Mr. Pemberton for the defendants Hudson and Fellows.

The case was twice argued. The grounds of the argument are noticed by the Chief Baron in the judgment. Mr. Pemberton insisted strongly that, in order to enable a mortgagee to tack, he must claim both sums in the same capacity, and that the plaintiff could not tack more than 178*l.* 13*s.* the sum due to him on the promissory notes as executor of Anthony Frere to the security of the 14th of May, 1813, made to Anthony Frere; and for this he relied on the case of *Barnett v. Weston*.

Lord Chief Baron Richards at first declined to give any judgment till the estate should be sold: but, upon an agreement to proceed regularly in case any party was dissatisfied with his judgment, his Lordship proceeded.

Lord Chief Baron.—This case came before me nominally, under the shape of a case for farther directions. I give no farther directions on the subject.

The first instrument is rather by way of introduction, to shew where the legal estate was; and is dated October 17th, 1786. By that instrument a moiety of the prebend is assigned to Wm. Bird to secure 1200*l.*, and odd pounds to Mr. Cooke, which sum was afterwards reduced to 1000*l.* There is no question at all between you with respect to that sum. That is clearly the first incumbrance on this estate. This Mr. Bird, in this situation, acquired the legal estate. The legal estate continued in him, Wm. Bird. His son Thomas Bird succeeded him; and he took renewals of this lease from time to time. I do not find any question is made with regard to this mortgage, or its security.

Then comes an indenture, dated Oct. 12th, 1806, by which Thos. Bird, the son, (who had, by this time, acquired all the legal estate in the prebend,) and Moore and his wife assigned a moiety of the lease to A. Frere, the brother of the present plaintiff, to secure 1460*l.* By this means A. Frere obtained the legal estate as to that moiety. From the indenture of May 14, 1813, which is the first instrument that raises this question, it appears that the legal estate had got back into T. Bird. In that indenture Bird covenants with T. Frere, and with Moore and his wife, to stand possessed of the whole to secure 2900*l.* to T. Frere, subject as to a moiety to Cooke's mortgage, and subject thereto according to the joint appointment of Moore and his wife. The effect of which covenant is this,—Moore and his wife being indebted to A. Frere in the sum of 2900*l.*, and Bird having

the legal estate of the whole prebend subject as to a moiety to Cooke's mortgage, they agree Bird shall undertake to become trustee for Frere to secure the 2900*l.*, with legal interest that should become due upon it. That is all the effect of that trust. He becomes trustee for that purpose, and that purpose only.

Then afterwards on Dec. 30, 1816, another deed is executed, to which Bird is not a party. I do not state the formal parts of the deed : but the object of that deed, referring to their power in the former deed of May 1813, was to secure on this estate 1200*l.* to Hudson and Fellows, who in this case insist by their counsel, that they stand next to A. Frere, after the payment of 2900*l.* This is expressly in execution of the power reserved to them in the former deed. There was a blank left as to the amount of Mr. Frere's mortgage in the deed of 1813: but the security was stated, though not the extent of it; so that beyond all question Hudson and Fellows had at that time notice of the security to Frere. And the consequence of that would be, that if they had afterwards obtained possession of the legal estate, they never could have made any use of it against Mr. Frere to the extent of 2900*l.* It has been argued, and I think truly, that by this deed the parties had notice of Frere's security; and it is also said, that the consequence of that, (which I do not see is so consistent with the truth, as the other part of the case, namely, the notice,) is that they were guilty of *laches*; and the more so because in the deed of Dec. 30, 1816, there was a blank left, and that blank might be for any sum, 10,000*l.* But then it must be remembered, if he had enquired of Frere what was the amount of his security, if he were bound to do it, and to have ascertained the amount secured to A. Frere by the deed of 1813, they could have had no other information, but that 2900*l.* with interest to a certain extent was due to Mr. Frere. It was also said it was the duty of Hudson and Fellows to have given notice to Frere, that they were about to advance their money on the security of this lease, which might have put him upon his guard against advancing more money, which he afterwards did. But, as I said before, at the date of this deed of the 30th of Dec. 1816, there was only due 2900*l.* and interest. Beyond all question Mr. Frere had become entitled to that sum and interest, against any security that could be given afterwards to Hudson and Fellows, or any other person whatever.

Then came the deed of 1817, in favour of Frere, and which Frere's representatives seek to tack, and to unite to the deed of 1813; and, in addition to the former mortgage of 2900*l.* and interest, it comprehends several other sums, making together 2162*l.*; and this sum is composed of different sums; part of which is due to Frere, as the executor of his

brother; 264*l.* was due to the plaintiff himself; different sums are due upon bond; and a small sum of 23*l.* is due to the plaintiff on the balance of an account: so that in truth there is nothing here that has even any thing like a lien on the land. The highest security is a bond, so that it stands thus:—In the year 1813, Mr. Anthony Frere took a security for 2900*l.* on the 30th of Dec. 1816. Mr. Hudson and Mr. Fellows took a security for 1200*l.*; and in 1817 the plaintiff took a farther security for 2162*l.*, in addition to that which was due to him as executor to his brother, on a former security.

Now the question is, whether the plaintiff is to tack and unite his two securities, and by that means postpone the security of 1816 to his own security of 1817. That is the question in this cause.

Neither of these parties has the legal estate; and each of them, in my view of the case, has an equal equity in this case. They were both honest incumbrances. The plaintiff was an honest mortgagee for 2162*l.* In addition to the former security of 2900*l.* and interest, Mr. Hudson and Mr. Fellows are honest mortgagees. There is no *laches* that can be imputed to Hudson and Fellows, when they advanced their money. There was no money then due to Mr. Anthony Frere but 2900*l.* with interest. I never heard yet that, when a person is about to advance his money on any security, that he is to give notice of that circumstance to another, who has previously advanced 2900*l.* on the same security,—Do not advance more money, because I am going to advance the owner of this estate some money. And that is the only notice that could be given by Mr. Hudson and Mr. Fellows to Mr. Frere. Were Hudson and Fellows bound when they were about to advance 1200*l.* to Moore and his wife to ask A. Frere,—Have you any more due to you? Because we must take whatever is due to you, and consider it as a prior security. But were they bound to go and tell him,—We know you have no more money due to you than 2900*l.* and interest: but we propose to advance them some money, and we desire you not to advance them any more money. That seems to be the only notice these persons could have given to Frere.

Now all these parties seem to have equal equities in point of honesty. Neither of them has the legal estate. And, in the absence of the legal estate, they are reduced to an equality in point of equity. And *qui prior in tempore potior in jure*, and therefore the security given in 1817.

But then it is contended for the plaintiff, that the covenant of Bird to stand possessed of the legal estate for the plaintiff is to be considered as tantamount to an assignment of the legal estate itself. That is certainly the point on which the pressure is very fairly made. Now by that covenant it is clear that Bird was trustee for Frere, but Frere had not the



legal estate. But it is said Hudson and Fellows had notice that Bird was trustee for Frere. To what extent? To the extent of 2900*l.*, and that is all. Well then, the legal estate continued in Mr. Bird, and was not assigned to Mr. Frere. And the question is then, whether this covenant to stand possessed does give this advantage to Mr. Frere, as if he had had the assignment of the legal estate? There is no doubt with respect to A. Frere having the original first right, as between him and Bird.

I take this to be clear:—if I agree to purchase an estate, and take a contract or covenant, and you sell that estate, or mortgage it to a person that has no notice, the first purchaser cannot avail himself by saying, I had a right to call on him for the legal estate; if the second purchaser can get at the legal estate, he can protect himself. So that the person who might have first called for the legal estate does not get the advantage against him who has got the legal estate, though *posterior in tempore*. Suppose there had been no covenant on the part of Bird, and supposing Mr. Frere had come against him, he might have filed a bill against him, and against Moore and his wife, to have had a good legal conveyance. Frere could have compelled it: but he did not compel it. If I have a right to obtain a conveyance of the legal estate, but I do not go to take the legal estate, you may go and get the legal estate: and I take this to be the rule of dispensing justice in equity. It is the rule in courts of equity, which delight in this maxim, *qui prior in tempore, potior in jure*.

It must be observed, however, there is a difference between the other cases and this case I am now considering. Here the second incumbrancer had notice the legal estate was held in trust for Frere: but the notice he had only amounts to the extent of 2900*l.* If Frere had been the purchaser of the estate, it would have been conclusive against the other. Frere has a prior equity to the amount of 2900*l.*, and interest: beyond that he has no other equity.

Now, this is not like any case that has been decided. I have looked with all the diligence I can, and perhaps it was not necessary for me to look. There is no case at all in point. I know of no case to distinguish between this case and the ordinary cases. There is a covenant to assign the legal estate, but then it is a covenant only for a given incumbrance. Now the case of Maudrell and Maudrell has been cited, (10 Ves. 246.) and certainly that is a case which one cannot view without infinite respect to the great talents and immense learning exhibited by Sir William Grant and the Lord Chancellor. But that is not a case that applies to this point. That is a case that applies to dower. It is an anomalous judgment on dower. If there is a legal estate, a term anterior to the right of dower

and outstanding ; to be sure the purchaser will have the benefit of that term, though he has notice of the right of dower.

There is also the case of *Ex parte Knott*, 11 Ves. 609. There there is an expression or dictum of the Lord Chancellor that was very properly adverted to : but the learned Counsel did not advert to the argument at all in that case.—(Here the Lord Chief Baron read it.)—Now, the Lord Chancellor says, I will not decide it in bankruptcy, a jurisdiction in which there is no appeal. He does not decide it ; he throws it out in the fulness of his learning, and as a matter for consideration. If the Lord Chancellor had expressed his opinion, of course I should have been very much disposed to pay great attention to it.

This being the case, then, we have the legal estate outstanding for the benefit of a man to the extent of one security. And nothing passes before another person advances his money on the security of that deed. Both of them have equal equities, beyond all question ; and neither of them has the legal estate. The circumstance of the covenant to stand possessed does not make any alteration as to the person that has the first, and second, and third.

Under these circumstances, my opinion is founded in this, that the legal estate should be divided according to the priorities. That, first, Mr. Cooke should have his 1000*l.* ; then Mr. Frere 2900*l.* with interest ; next Hudson and Fellowes 1200*l.* ; and then Mr. Frere comes in for the rest.

Mr. Pemberton, in his argument, stated the case of *Barnet v. Western*, 12 Ves. 130. That case was decided by the Master of the Rolls, and was probably well decided : but I do not think that case is like this case. I do not think it is necessary for me to detain the Court in detailing that case.

If you sell the estate, and give me an opportunity of putting the matter to rights, I shall be very glad to look at my opinion, and shall give you the same opinion in point of substance.

## No. 11.

ROBINSON ET AL. v. HARRINGTON ET AL. (a)

*Hilary Term, 1778.*

THIS case came before the Court upon exceptions to the Master's report.

The case appeared to be this:—In 1739 the defendant gave a bond for 400*l.* to Sarah Green, and in Trinity Term, 1744, the obligee brought an action against the defendant upon this bond, who pleaded the general issue; and the issue roll upon which the same was entered was regularly carried in of the term in which the issue was joined; but the cause was never tried, the parties being under an agreement to compromise the same. However, the plaintiff entered continuance upon the roll regularly by *non misit breve*, till Michaelmas Term, 1745, when the defendant withdrew his plea, and confessed judgment. The clerk of the judgments then entered up final judgment upon the issue roll: but never took any docket of the same to the clerk of the essoigns, which, according to the statute of the 4 and 5 W. and M. c. 20. he ought to have done. When, therefore, the judgment creditor came before the Master, though the judgment appeared to be signed 29th May, 1745, he postponed it to other judgments of 1748, because Mrs. Green's judgment was not docketed with the clerk of the essoigns.

When the exception to the Master's report came on before the Court, it was contended on behalf of Mr. Strafford, as the representative of Mrs. Green, that the Master ought to have placed her judgment in priority, according to the signing, and that the statute of the 4 and 5 W. and M. made no alteration whatever in priority, as between judgment creditor and judgment creditor; for the act only said,—“that no judgment, not docketed and entered up in the books pursuant to the statute, should affect any lands as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors' testators' or intestates' estates.” This, therefore was

(a) *Ante*, 313. S.C. 1 Pow. on Mortg. 518. 4th edit.

not a case within that act ; for the great object of the statute of William and Mary, as appeared most clearly by the preamble, was to enable purchasers and mortgagees to find out such judgments as affected the lands they were about to purchase or advance money upon, and likewise to give to heirs, executors, and administrators, an opportunity of enquiring what judgments were entered up against their ancestors, testators, or intestates, so that they might apply their estates and effects in a due course of administration ; that, at common law, judgments did not affect lands and tenements : but, by the statute of Westminster the 2d, the writ of *elegit* was given, whereby a plaintiff might extend a moiety of the lands and tenements, of which the defendant was seized at the time of the judgment *recovered* ; that however, as all judgments at common law were, by a fiction, supposed to be judgments of the first day of the term, there was no distinction respecting that matter until the time of Cha. 2. when it was enacted by the statute of frauds and perjuries,—“ That any judge or officer of any of his Majesty’s courts at Westminster that should sign any judgment should, at the signing the same, without fee for doing the same, set down the day of the month and year of his so doing upon the paper, book, docket, or record, which he should sign, which day of the month and year should be also entered upon the margin of the roll of the record, where the said judgment should be entered.” And it was further enacted, that such judgments, as against purchasers *bonú fide* for a valuable consideration, of lands, tenements, and hereditaments, to be charged thereby, should, in consideration of law, be judgments only from such time as they should be so signed ; and should not relate to the first day of the term whereof they were entered, or the day of the return of the original, or filing the bill ; any law, usage, &c. to the contrary notwithstanding.

But though this act of parliament settled all difficulties respecting the fiction of law, whereby judgments were supposed to be all of the first day of the term, by compelling the party to set down the particular period when the judgment was signed, and declaring that, as against purchases *bonú fide* for a valuable consideration, the lands, tenements, and hereditaments, to be charged thereby, should be charged only from such time as the judgment was signed ; yet, inasmuch as it did not compel the plaintiff to carry in the judgment roll, purchasers and others were rendered almost incapable of discovering what judgments were recovered. And therefore the statute of 4 and 5 W. and M. c. 20, to remedy that inconvenience, directed that all judgments should be docketed, and entered with the particular officers of such court ; and that, unless they were so docketed, they should not affect any lands or tenements.

ments as to purchasers or mortgagees; or have any preference against heirs, executors, or administrators, in their administration of their ancestors' testators' or intestates' estates. But this did not take away the right which a judgment creditor had by the statute of Westminster to extend the lands of his debtor; it only laid him under particular restrictions in particular cases, which Mr. Strafford did not come within the meaning of.

It was further contended and admitted, that if Mr. Strafford had sued out an *elegit*, and brought an ejectment to recover a moiety of the land of his debtor, he might have laid his demise on the day on which the judgment was recovered; which plainly proved that the lands were affected from the time of the judgment recovered, and not from the time of the docketing. For if there had been two judgment creditors of the same day, one docketed and the other not docketed, and the undocketed creditor had got possession by virtue of an *elegit*, the docketed judgment creditor could not oust or eject him from the possession, till his debt had been fully satisfied out of the rents and profits, which was agreed to by the Court; and Mr. Strafford ordered to stand in priority, according to the signing of his judgment, and his exception allowed.

### No. III.

#### MORTGAGE IN FEE.

[Accompanied with a Bond and Warrant of Attorney.]

THIS INDENTURE, made the 28th day of September, in the year of our Lord 1821, between A. B., of, &c. and E., his wife, of the one part, and C. D., of, &c. of the other part. WHEREAS the said A. B. is seised of or well entitled unto the inheritance in fee simple, in possession of, and in the messuage or tenement, pieces or parcels of land, and hereditaments hereinafter mentioned and intended to be hereby released, with the appurtenances. AND WHEREAS the said A. B. having occasion for the sum of 1000*l.* hath applied to and requested the said C. D. to lend and advance him the same, which he hath agreed to do upon having the repayment thereof with interest secured to him by a mortgage of the said messuage or tenement, pieces or parcels of land and hereditaments, in manner hereinafter mentioned; and by a bond and war-

rant of attorney to confess judgment thereon. AND WHEREAS the said A. B. hath, in pursuance of the said agreement, by his bond or obligation in writing, bearing even date with these presents, become bound unto the said C. D. in the penal sum of 2000*l.*, with a condition thereunder written for making void the same on payment by the said A. B., his heirs, executors, or administrators, unto the said C. D., his executors, administrators, or assigns, of the sum of 1000*l.* with interest for the same, after the rate and in manner therein mentioned. AND WHEREAS the said A. B. hath in further pursuance of the said agreement executed a warrant of attorney, bearing even date with the said bond and these presents, thereby authorizing and empowering certain attorneys therein named, to confess a judgment against him in his Majesty's Court of King's Bench, in an action of debt upon the said bond, for the said sum of 1000*l.* and costs of suit. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for effectuating the same in this behalf; and for and in consideration of the said sum of 1000*l.* of lawful money of Great Britain by the said C. D. to the said A. B. in hand well and truly paid at or before the sealing and delivery of these presents; the receipt whereof he the said A. B. doth hereby acknowledge, and thereof and of and from the same and every part thereof, doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns, and every of them for ever, by these presents He the said A. B. Hath granted, bargained, sold, aliened, released and confirmed; And by these presents Doth grant, bargain, sell, alien, release, and confirm unto the said C. D. (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said A. B. for five shillings' consideration, by indenture, bearing date the day next before the day of the date of these presents, for the term of a year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) and to his heirs and assigns ALL, &c.—(*Describe the parcels.*)—TOGETHER with all and singular outhouses, buildings, barns, stables, yards, backsides, orchards, gardens, ways, waters, watercourses, sewers, ditches, drains, lands, meadows, pastures, feedings, mines, delfs, quarries, woods, underwoods, commons, common of pasture and turbary, hedges, fences, lights, liberties, easements, profits, privileges, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever, to the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore mentioned, and intended to be hereby released, or any part or parcel thereof, belonging or in any wise appertaining, or to or with the same or any part

thereof, now or at any time heretofore usually had, held, used, occupied, possessed or enjoyed, or accepted, reputed, deemed, taken, or known to be as part, parcel, or member thereof, or of any part thereof. AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof; AND all the estate, right, title, interest, use, trust, possession, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said A. B., of in to or out of the same premises, every or any part or parcel thereof, TO HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore mentioned and intended to be hereby released, with their appurtenances, unto the said C. D., his heirs and assigns, To the use of the said C. D., his heirs and assigns, for ever; but subject to the proviso or agreement for redemption of the said premises hereinafter inserted and contained. AND the said A. B. for himself, his heirs, executors, and administrators, and for said E. his wife, (she the said E. B. hereby voluntarily consenting thereto,) doth covenant, promise, and grant, to and with the said C. D., his heirs and assigns, by these presents, that they, the said A. B. and E. his wife, shall and will as of Trinity Term now last past, or of Michaelmas Term now next ensuing, or of some subsequent term, at the request of the said C. D., his heirs or assigns, but at the proper costs and charges of the said A. B. and his heirs, acknowledge and levy in due form of law before the Justices of his Majesty's Court of Common Pleas at Westminster, one or more fine or fines sur conuzance de droit come ceo, &c. to be engrossed, recorded, and sued forth, with proclamations, according to the form of the statute in that case made and provided; and the common course of fines with the proclamations there used unto the said C. D. and his heirs, of the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore mentioned, and intended to be hereby released, with their and every of their appurtenances, by such apt and convenient name and names, number of messuages and acres, quantities and qualities of land, and other descriptions as will effectually comprise the same, and shall for that purpose be thought fit and requisite. And it is hereby agreed and declared by and between the said parties to these presents to be the true intent and meaning of these presents, and of the said parties, that as well the said fine or fines so as aforesaid, or in any other manner to be had and levied, as also all and every other fine or fines, common recovery or common recoveries, conveyances, and assurances in the law whatsoever, already had, made, done, acknowledged, levied, suffered or executed, or hereafter to be had, made, done, acknowledged,

levied, suffered, or executed, by or between the said parties to these presents or any of them, or whereunto they or any of them, was, were, is, are, or shall or may be parties or party, or privies or privy, of all and singular the said messuage or tenement, pieces or parcels of land, hereditaments, and premises hereinbefore mentioned, and intended to be hereby released, or any of them, or any part or parts of the same, either alone or together, with any other messuages, lands, tenements, or hereditaments, shall, from and immediately after the levying, suffering, making, executing, and perfecting thereof, be and enure, and shall be adjudged, construed, deemed, and taken to be and enure, and are hereby declared to be at the time of the making, levying, and suffering thereof, meant and intended to be and enure, as to the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released to the use of the said C. D., his heirs and assigns for ever, but subject to the proviso or agreement next hereinafter inserted, and contained (that is to say) **PROVIDED ALWAYS**, and it is hereby agreed and declared, by and between the said parties to these presents, that if the said A. B., his heirs, executors or administrators, or any of them, shall, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, well and truly pay, or cause to be paid, unto the said C. D., his executors, administrators or assigns, the sum of 1000*l.* of lawful money of Great Britain, with interest for the same, after the rate of 5*l.* for every 100*l.* for a year, in manner following, (that is to say) the sum of 25*l.* being one half year's interest thereof, after the rate aforesaid, on the 28th day of March, now next ensuing, and the sum of 1025*l.* being the said principal money, and another half year's interest thereof, after the rate aforesaid, on the 28th day of September, then next following, and which will be in the year of our Lord 1822, without making any deduction, defalcation or abatement thereout whatsoever, for or by reason or means of any taxes, assessments, or impositions, taxed, charged, assessed, or imposed, or to be taxed, charged, assessed, or imposed upon the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, or upon the said sum of 1000*l.* and interest, hereby intended to be secured, or any part thereof respectively, or upon the said C. D., his heirs, executors, administrators or assigns, for or in respect thereof, by any present or subsequent act of parliament, or other authority whatsoever, in any manner howsoever; then and from thenceforth he, the said C. D., his heirs or assigns, shall and will, upon the request, and at the costs and charges of the said A. B., his heirs or assigns, release and reconvey all and singular the said mes-



suage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, with their and every of their appurtenances, unto and to the use of the said A. B., and his heirs, or unto such other person or persons as he or they shall direct or appoint, freed and discharged of and from all incumbrances made, done, or committed by him the said C. D., his heirs, executors, administrators or assigns, in the mean time. AND the said A. B. for himself, his heirs, executors, administrators and assigns, and every of them, doth covenant, promise, and agree, to and with the said C. D., his heirs, executors, administrators and assigns respectively, by these presents, in manner following, (that is to say) that he the said A. B., his heirs, executors, administrators or assigns, or some or one of them, shall and will, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, well and truly pay, or cause to be paid, unto the said C. D., his executors, administrators or assigns, the sum of 1000*l.* of lawful money of Great Britain, with interest for the same, after the rate of 5*l.* for every 100*l.* for a year, in manner following, (that is to say) the sum of 25*l.* being one half year's interest thereof, after the rate aforesaid, on the 28th day of March, now next ensuing, and the sum of 1025*l.* being the said principal money, and another half year's interest thereof, after the rate aforesaid, on the 28th day of September then next following, and which will be in the year of our Lord 1822, without any deduction, defalcation, or abatement for taxes, or otherwise howsoever. AND also, that he the said A. B., now at the time of the sealing and delivery of these presents, is and standeth lawfully, rightfully, and absolutely, seized of and in all and singular the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, with their and every of their appurtenances of and for a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, trust, power of revocation, remainder or limitation of any use or uses, or other restraint, cause, matter or thing whatsoever, to alter, change, charge, defeat, revoke, make void, lessen or encumber the same. And also, that he the said A. B. now hath in himself good right, full power, and lawful and absolute authority, by these presents, to release, convey and assure all and singular the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, and every part and parcel thereof, with their and every of their appurtenances, unto and to the use of the said C. D., his heirs and assigns for ever, in manner and form aforesaid, and according to the true intent and meaning of these presents. AND FURTHER, that if

default shall happen to be made of or in payment of the said sum of 1000*l.*, and interest for the same, at and after the rate aforesaid, or any part thereof, on the days and times, and at the place and in manner in the proviso above mentioned for payment thereof, that then and from thenceforth it shall and may be lawful to and for the said C. D., his heirs and assigns, into and upon all and singular the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, or any part thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, and enjoy, and the rents, issues and profits thereof to receive and take to his and their own use and benefit without any lawful let, suit, trouble, hindrance, eviction, expulsion or interruption of or by the said A. B., his heirs or assigns, or any other person or persons whomsoever. AND that free and clear, and freely and clearly acquitted, exonerated and discharged, or otherwise by the said A. B. his heirs, executors, administrators and assigns, or some or one of them, well and sufficiently saved, defended, kept harmless, and indemnified, of from and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, trusts, wills, entails, statutes, recognizances, judgments, extents, executions, rents and arrears of rent, annuities, estates, titles, troubles, charges and incumbrances whatsoever, had, made, done, committed or suffered by him the said A. B., his heirs or assigns, or any other person or persons whomsoever. AND MOREOVER that he the said A. B. and his heirs, and all and every other person and persons having or lawfully claiming, or who shall or may at any time hereafter have or lawfully claim any estate, right, title, trust or interest, of into or out of the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned and intended to be hereby released, or any part or parcel thereof, shall and will, from time to time and at all times after default shall happen to be made of or in payment of the said sum of 1000*l.* and the interest thereof or any part thereof respectively, on the days and times and in manner hereinbefore mentioned, and appointed for payment thereof, upon the reasonable request of the said C. D., his heirs, executors, administrators or assigns, but at the costs and charges in the law of the said A. B., his heirs or assigns, make, do, acknowledge, levy, suffer and execute, or cause and procure to be made, done, acknowledged, levied, suffered and executed, all and every such further and other lawful and reasonable act and acts, thing and things, deeds, devises, conveyances and assurances in the law whatsoever, for the further and better, more perfect and absolute granting, releasing, assuring and confirming all and singular

the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned and intended to be hereby released, with their and every of their appurtenances, unto and to the use of the said C. D., his heirs and assigns, for ever, freed and discharged of and from the proviso or condition hereinbefore contained, for redemption of the same hereditaments and premises and all other equity of redemption whatsoever, as by the said C. D., his heirs or assigns, or his or their counsel learned in the law, shall be lawfully and reasonably devised or advised and required. AND it is hereby agreed and declared by and between the said parties to these presents, that in the mean time and until default shall happen to be made of or in payment of the said sum of 1000*l.* and interest, or some part thereof respectively, contrary to the form and effect of the aforesaid proviso and covenant for payment thereof, it shall and may be lawful to and for the said A. B., his heirs and assigns, peaceably and quietly to have, hold and enjoy all and singular the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned and intended to be hereby released, with the appurtenances, and to receive and take the rents, issues, and profits thereof and of every part thereof, to and for his and their own proper use and benefit, without the lawful let, suit, denial, interruption or disturbance, of from or by the said C. D., his heirs, executors, administrators or assigns, or any person or persons lawfully claiming or to claim by from or under or in trust for him, them, or any of them. In WITNESS, &c.

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#### No. IV.

#### MORTGAGE BOND.

KNOW ALL MEN by these presents, that I, A. B., of, &c. am held and firmly bound to C. D., of, &c. in the sum of 2000*l.* of lawful money of Great Britain, to be paid to the said C. D. or his certain attorney, executors, administrators or assigns. For which payment to be well and truly made I bind myself, my heirs, executors and administrators, and every of them, firmly by these presents sealed with my seal, dated the 28th day of September in the year of our Lord One thousand eight hundred and twenty-one.

THE CONDITION of the above-written obligation is such that if the above-bounden A. B., his heirs, executors or administrators, or any of them, do and shall well and truly pay or cause to be paid unto the above named C. D., his executors, administrators or assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, the sum of 1000*l.* of lawful money of Great Britain, with interest for the same after the rate of 5*l.* for every hundred, for a year, in manner following, (that is to say) the sum of 25*l.*, being one half year's interest thereof after the rate aforesaid, on the 28th day of March now next ensuing, and the sum of 1025*l.* being the said principal money, and another half year's interest thereof after the rate aforesaid, on the 28th day of September then next following, and which will be in the year of our Lord One thousand eight hundred and twenty-two, without making any deduction or abatement thereout whatsoever. Then the above-written obligation to be void and of none effect, but otherwise to be and remain in full force and virtue.

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## No. V.

### WARRANT OF ATTORNEY TO CONFESS JUDGMENT.

TO E. F., G. H., and I. K., gentlemen, attornies of his Majesty's Court of King's Bench at Westminster, jointly and severally, or to any other attorney of the same Court.

THESE are to desire and authorize you the attornies above named, or any one of you, or any other attorney of the Court of King's Bench aforesaid, to appear for me A. B. of, &c. in the said Court as of Trinity Term last, Michaelmas Term next, or any other subsequent term, and then and there to receive a declaration for me in an action of debt \* (a) on a bond or obligation made and entered into by me the said A. B. to C. D. of, &c., in the penal sum of 2000*l.* at the suit of the said C. D.\* his executors or administrators; and thereupon to confess the same action, or else to suffer a judgment by *nil dicit*, or otherwise to pass against me in the same action, and to be thereupon forthwith entered up against me of record of

(a) If the warrant be to secure money in an action of debt, instead of the words between the asterisks, say, "for ———*l.* for money borrowed at the suit of C. D. of, &c." *his, &c.*

the said Court for the said sum of 2000*l.* besides costs of suit. AND I the said A. B. do hereby further authorize and empower you the said attornies, or any one of you, after the said judgment shall be entered up as aforesaid for me and in my name and as my act and deed to sign, seal and execute a good and sufficient release in the law to the said C. D., his heirs, executors and administrators of all and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all misprisions of error and errors, defects and imperfections whatsoever, had, made, committed, done, or suffered in about touching or concerning the aforesaid judgment, or in about touching or concerning any writ, warrant, process, declaration, plea, entry, or other proceedings whatsoever, of or any way concerning the same; and for what you the said attornies or any one of you shall do or cause to be done in the premises, or any of them, this shall be to you and every of you a sufficient warrant and authority.—IN WITNESS, &c.

#### DEFEAZANCE FOR THE WARRANT OF ATTORNEY. (*a*)

MEMORANDUM that the within warrant of attorney is given for securing the payment from the within named A. B. to the within named C. D. of the sum of 1000*l.* and interest (*b*) \*according to the condition of the within mentioned bond,\* being the same sum of 1000*l.* and interest as are secured to the said C. D. from the said A. B. by a mortgage made to him by certain indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing even date herewith. AND it is agreed that no action, execution, or other process or proceedings shall be commenced, sued out or prosecuted against the said A. B., his heirs, executors, administrators, lands, goods and chattels, upon the judgment to be entered up in pursuance of the within warrant, until default shall happen to be made in payment thereof, as witness our hands the day and year within written.

C. D.

A. B.

Witness, L. M.

(*a*) Ante 23, 24.

(*b*) If the warrant be to secure money in an action for debt, instead of the words between the asterisks, say, “on the days and in manner following (that is to say) the sum of 25*l.* being the interest thereof for half a-year, on the 28th day of March now next ensuing, and the sum of 1025*l.*, being the said principal money, and another half-year’s interest thereof on the 28th day of Sept. 1822.”

## No. VI.

## MORTGAGE BY DEMISE,

With Covenant to insure against Fire.

THIS INDENTURE made, &c. Between A. B. of &c. of the one part and C. D. of &c. of the other part. WHEREAS the said A. B. is seized of or well entitled unto the inheritance in fee simple in possession of and in the messuage or tenement, pieces or parcels of land and hereditaments hereinafter mentioned, and intended to be hereby granted, bargained, sold and demised, with the appurtenances. AND WHEREAS the said A. B., having occasion for the sum of ——*l.*, hath requested the said C. D. to lend and advance him the same, which he hath agreed to do upon having the repayment thereof with interest secured to him by a mortgage of the said messuage or tenement, pieces or parcels of land and hereditaments, in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and for and in consideration of the sum of ——*l.* of lawful money of Great Britain by the said C. D. to the said A. B. in hand well and truly paid at or before the sealing and delivery of these presents, the receipt whereof he the said A. B. doth hereby acknowledge, and thereof and of and from the same and every part thereof doth acquit, release and discharge the said C. D., his heirs, executors and administrators, and every of them, for ever, by these presents He the said A. B. Hath granted, bargained, sold and demised, And by these presents Doth grant, bargain, sell and demise unto the said C. D., his executors, administrators and assigns, ALL, &c. (*insert the parcels*) TOGETHER with all and singular outhouses, buildings, barns, stables, yards, backsides, orchards, gardens, ways, watercourses, sewers, ditches, drains, lands, meadows, pastures, feedings, mines, delfs, quarries, woods, underwoods, commons, common of pasture and turbary, hedges, fences, lights, liberties, easements, profits, privileges, commodities, advantages, emoluments, hereditaments and appurtenances whatsoever to the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore mentioned and intended to be hereby granted, bargained, sold and demised, or any part or parcel thereof belonging or in anywise appertaining, or to or with the same or any part thereof now or at any time heretofore usually had, held, used, occupied, possessed or enjoyed, or accepted, reputed, deemed, taken or known to be as part, parcel or member thereof, or of any part thereof, AND the reversion and reversions, remainder and remainders, yearly and

other rents, issues and profits thereof, TO HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised, with their and every of their appurtenances unto the said C. D., his executors, administrators and assigns, henceforth for and during and unto the full end and term of five hundred years, and fully to be complete and ended, without impeachment of or for any manner of waste; YIELDING AND PAYING therefore yearly and every year during the said term unto the said A. B., his heirs or assigns, the rent of one peppercorn, if the same shall be lawfully demanded, and subject to the proviso or agreement for making void the said term next hereinafter inserted and contained, (that is to say,) PROVIDED ALWAYS, and it is hereby agreed and declared by and between the said C. D. and A. B. that if the said A. B., his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the said C. D., his executors, administrators or assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, the sum of ——*l.* of lawful money of Great Britain with interest for the same after the rate of 5*l.* for every 100*l.* by the year in manner following (that is to say) the sum of ——*l.* being half a year's interest on the said sum of ——*l.* after the rate aforesaid, upon the — day of — next ensuing the date of these presents, and the further sum of ——*l.*, being the said principal money, and another half year's interest after the rate aforesaid, upon the — day of — then next following, and which will be in the year of our Lord —, without making any deduction or abatement whatsoever thereout for or in respect of any taxes, charges, rates, assessments, impositions, or any other matter or thing already taxed, charged, assessed, or imposed, or which shall or may at any time or times hereafter be taxed, charged, assessed or imposed upon the said messuage or tenements, pieces or parcels of land, hereditaments and premises hereinbefore mentioned and intended to be hereby granted, bargained, sold, and demised, or upon the said sum of ——*l.* and interest, or any part thereof, or upon the said C. D., his executors, administrators, or assigns, in respect thereof by authority of parliament or otherwise howsoever, then and in such case the said term of 500 years shall cease and determine, any thing herein contained to the contrary thereof in anywise notwithstanding. AND the said A. B. doth for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, by these presents in manner following (that is to say) that he the said A. B., his heirs, executors or administrators shall and will well and truly pay or cause to be paid unto the said C. D., his executors, administrators

or assigns, the sum of ——*l.* of lawful money of Great Britain, with interest for the same at and after the rate of 5*l.* for every 100*l.* by the year on the days and times, and in the manner hereinbefore limited and appointed for payment thereof according to the true intent and meaning of these presents, without any deduction or abatement whatsoever as aforesaid; AND that he the said A. B. now at the time of the sealing and delivery of these presents is and standeth lawfully, rightfully and absolutely seized of and in all and singular the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned and intended to be hereby granted, bargained, sold and demised, with their and every of their appurtenances of and in a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, trust, power of revocation, remainder or limitation of any use or uses or other restraint, cause, matter or thing whatsoever to alter, change, charge, defeat, revoke, make void, lessen or incumber the same; AND also that he the said A. B. now hath in himself good right, full power and lawful and absolute authority by these presents to grant, bargain, sell and demise the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised, with their and every of their appurtenances, unto the said C. D., his executors, administrators and assigns, in manner aforesaid according to the true intent and meaning of these presents. AND FURTHER, that if default shall happen to be made of or in payment of the said sum of ——*l.* and the interest thereof, or of any part thereof unto the said C. D., his executors, administrators or assigns, on the days and times and in the manner hereinbefore limited and appointed for payment thereof contrary to the true intent and meaning of the said proviso and agreement hereinbefore contained; then and from thenceforth it shall and may be lawful to and for the said C. D., his executors, administrators or assigns from time to time and at all times thereafter peaceably and quietly to enter into and upon, and have, use, occupy, possess and enjoy the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised, with their and every of their appurtenances, and to have, receive and take the rents and profits thereof to and for his and their own use and benefit for and during the residue and remainder, which shall be then to come and unexpired of the said term of 500 years, without the let, suit, trouble, molestation, interruption or disturbance of him the said A. B., his heirs or assigns, or any other person or persons whomsoever. AND that free and clear and freed and clearly acquitted, exonerated and discharged or otherwise by him the said A. B., his heirs, executors or



administrators well and sufficiently saved, defended, kept harmless and indemnified of from and against all and all manner of former and other gifts, grants, bargains, sales, leases, demises, mortgages, jointures, intails, rents and arrears of rent, statutes, judgments, titles, troubles, charges and incumbrances whatsoever. AND MOREOVER that he the said A. B., his heirs and assigns, and all and every other person and persons whomsoever having or lawfully or equitably claiming, or who shall or may hereafter have or lawfully or equitably claim any estate, right, title, trust, or interest in to or out of the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised, or any part thereof from time to time and at all times after default shall happen to be made of or in payment of the said sum of —£. and interest, or of any part thereof contrary to the true intent and meaning of the said proviso and agreement hereinbefore contained, shall and will at the request of the said C. D., his executors, administrators or assigns, but at the proper costs and charges of the said A. B., his heirs or assigns, make, do, acknowledge, levy, suffer and execute, or cause or procure to be made, done, acknowledged, levied, suffered and executed, all and every such further and other lawful and reasonable act and acts, thing and things, deed and deeds, conveyances and assurances in the law whatsoever, not only for the further, better, more perfect and absolute granting, conveying and assuring all and singular the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised with their appurtenances, unto the said C. D., his executors, administrators and assigns, for and during all the rest and residue which shall be then to come and unexpired of the said term of 500 years therein granted as aforesaid, freed and discharged of and from the proviso and condition hereinbefore contained, and all other provisos, rights, equity and benefit of redemption whatsoever; but also for the perfect and absolute granting, conveying and assuring the reversion and inheritance in fee simple expectant on the determination of the said term of 500 years of and in the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised unto the said C. D., his heirs and assigns, or to some person or persons in trust for him and them as by the said C. D., his executors, administrators or assigns, or his their or any of their counsel learned in the law shall in that behalf be reasonably devised or advised and required. AND it is hereby agreed and declared by and between the said C. D. and A. B., that until default shall be made of or in payment of the said

sum of ——*l.* and interest hereby secured as aforesaid, or some part thereof, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said A. B., his heirs and assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy all and singular the said messuage or tenement, pieces or parcels of land, hereditaments, and premises hereinbefore mentioned and intended to be hereby granted, bargained, sold and demised, with their appurtenances, and to have, receive and take the rents, issues and profits thereof to and for his and their own proper use and benefit without any hindrance, suit, trouble, molestation, interruption, eviction, claim or demand whatsoever of or by the said C. D., his executors, administrators or assigns, or of any other person or persons claiming by, from or under him, them or any of them. AND the said A. B. for himself, his heirs, executors, and administrators, doth further covenant, promise and agree to and with the said C. D., his executors, administrators and assigns by these presents, that he the said A. B., his heirs, executors or administrators, shall and will from time to time and at all times hereafter so long as the said principal sum of ——*l.* or any part thereof shall remain due and owing upon security of the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised, insure and keep insured in some or one of the public offices for insurance against loss or damage by fire within the cities of London and Westminster or one of them, upon the same messuage or tenement, hereditaments and premises, as to fire or damage happening hereby, in the whole the sum of ——*l.*; and that he the said A. B., his heirs, executors and administrators, at his and their expence, shall and will, immediately upon making or renewing every policy of such insurance, assign the same and the benefit thereof to the said C. D., his executors, administrators and assigns. AND it is hereby agreed and declared between and by the said parties to these presents, that in case the said A. B., his heirs, executors or administrators, shall at any time during the continuance of the said security, refuse or neglect to insure the said sum of ——*l.*, or to make such assignment of the policy or policies so to be made or taken as aforesaid, that then and so often it shall and may be lawful to and for the said C. D., his executors, administrators or assigns, in like manner to insure the said sum of ——*l.* or any less sum, and for such time as he or they shall think proper; and that all such policies of insurance so to be assigned, renewed, made or taken, shall be to the use of or in trust for the said C. D., his executors, administrators and assigns, for better securing to him and them the payment of the said sum of ——*l.*, and the interest to grow due for the same and subject

thereto, in trust for the said A. B., his heirs and assigns. AND the said A. B. doth hereby declare and agree that the premium, costs and charges attending the making of such insurance by the said C. D., his executors, administrators or assigns, or which he or they shall pay, expend or be put unto in or about the receiving or recovering of the money thereby recoverable, shall stand charged upon the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby granted, bargained, sold and demised; and carry interest from the respective times of such payment thereof, after the rate of 5*l.* for 100*l.* for a year. IN WITNESS, &c.

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## No. VII.

### MORTGAGE OF RENEWABLE LEASEHOLDS. (a)

THIS INDENTURE made the 29th day of September, in the year of our Lord 1821, BETWEEN A. B. of, &c. of the one part, and C. D. of, &c. of the other part, WHEREAS by a certain indenture of lease, bearing date on or about the 25th day of March, which was in the year of our Lord 1817, and made or expressed to be made between E. F. of, &c. of the one part, and the said A. B. of the other part. It is witnessed that, for the considerations therein mentioned, the said E. F. did lease and demise unto the said A. B., his executors, administrators and assigns, ALL, &c. (*insert the parcels*) together with all and singular (*insert the general words from the lease*) TO HOLD the same unto the said A. B., his executors, administrators and assigns, from the day of the date of the said indenture now in recital, for the term of twenty-one years, at the yearly rent of 4*l.* payable half-yearly, as therein mentioned, and subject to the covenants and agreements therein contained, and on the lessee's or assignee's part of the same premises to be kept and performed. AND WHEREAS the said A. B., having occasion for the sum of 500*l.*, hath requested the said C. D. to lend and advance him the same, which he hath agreed to do upon having the repayment thereof, with interest, secured to him by a mortgage of the said pieces or parcels of land and premises, comprized in and demised by the said hereinbefore in part recited indenture of lease in manner hereinafter mentioned. NOW THIS INDENTURE

WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of 500*l.* of lawful money of Great Britain, by the said C. D. to the said A. B. in hand well and truly paid at or before the sealing and delivery of these presents; the receipt whereof he the said A. B. doth hereby acknowledge, and thereof and of and from the same, and every part thereof, doth acquit, release and discharge, the said C. D., his executors, administrators and assigns, and every of them for ever, by these presents, He the said A. B. Hath bargained, sold, assigned, transferred, and set over, And by these presents Doth bargain, sell, assign, transfer, and set over unto the said C. D., his executors, administrators and assigns, THE said pieces or parcels of land, and all and singular other the premises mentioned, described and comprized in the said hereinbefore in part recited indenture of lease of the 25th day of March, 1817, and thereby demised or mentioned, and intended so to be, with their and every of their appurtenances, AND all the estate, right, title, interest, term and terms for years yet to come and unexpired therein, trust, possession, property, possibility, benefit, claim, and demand whatsoever, as well legal as equitable, of him the said A. B. of, in, to or out of the same premises, every or any part or parcel thereof, TO HAVE AND TO HOLD the said pieces or parcels of land, and all and singular other the premises hereinbefore mentioned, and intended to be hereby assigned, with their and every of their appurtenances, unto the said C. D., his executors, administrators and assigns, henceforth for and during all the rest residue and remainder now to come and unexpired, of the said term of twenty-one years thereof, granted by the said hereinbefore in part recited indenture of lease, and for and during all the renewable and other the estate, term and interest of him, the said A. B. of and in the same premises, but subject nevertheless to the proviso or agreement for redemption thereof, hereinafter inserted and contained (that is to say) PROVIDED ALWAYS, and it is hereby agreed and declared, by and between the said parties to these presents, that if the said A. B., his heirs, executors or administrators, or any of them, shall, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, well and truly pay or cause to be paid unto the said C. D., his executors, administrators or assigns, the sum of 500*l.* of lawful money of Great Britain, with interest for the same, after the rate of 5*l.* for every 100*l.* for a year, in manner following, (that is to say) the sum of 12*l.* 10*s.*, being one half year's interest thereof, after the rate aforesaid, on the 29th day of March now next ensuing, and the sum of 512*l.* 10*s.* being the said principal money, and another half-year's interest thereof, after the rate aforesaid, upon the 29th day of September then next following, and which will be

in the year of Lord 1822, without making any deduction, defalcation, or abatement thereout whatsoever, for or by reason or means of any taxes, charges, assessments, impositions, or other matter or thing whatsoever, already taxed, charged, assessed, or imposed, or which shall or may at any time or times hereafter be taxed, charged, assessed, or imposed upon the said pieces or parcels of land and premises hereinbefore mentioned, and intended to be hereby assigned, or any part thereof, or the occupiers thereof, or of any part thereof, or upon the said C. D., his executors, administrators or assigns, for or in respect thereof, or upon the said sum of 500*l.*, or the interest thereof, or of any part thereof by authority of parliament, or otherwise howsoever, then and from thenceforth the said C. D., his executors, administrators or assigns, shall and will assign and assure the said pieces or parcels of land and premises hereinbefore mentioned, and intended to be hereby assigned, with their and every of their appurtenances, unto the said A. B., his executors, administrators or assigns, or as he or they shall direct or appoint, free from all incumbrances in the mean time had, made, done, or committed by the said C. D., his executors, administrators or assigns, or any other person or persons lawfully claiming, or to claim, by, from or under, or in trust for him, them, or any of them. AND for the aforesaid consideration the said A. B. for himself, his heirs, executors and administrators, doth covenant, promise, declare, and agree to and with the said C. D., his executors, administrators and assigns, by these presents, in manner following, (that is to say) that he the said A. B., his executors, administrators or assigns, some or one of them, shall and will, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, well and truly pay, or cause to be paid, unto the said C. D., his executors, administrators or assigns, the sum of 500*l.* of lawful money of Great Britain, with interest for the same, after the rate of 5*l.* for every 100*l.* for a year, in manner following (that is to say) the sum of 12*l.* 10*s.*, being one half-year's interest thereof, after the rate aforesaid, on the 29th day of March now next ensuing, and the sum of 512*l.* 10*s.*, being the said principal money, and another half-year's interest thereof, after the rate aforesaid, on the 29th day of September, then next following, and which will be in the year of our Lord 1822, without any deduction, defalcation or abatement for taxes, or otherwise howsoever. AND FURTHER, that the said hereinbefore in part recited indenture of lease is a good and subsisting lease valid in the law, and not forfeited, surrendered or otherwise determined or become void or voidable. AND that he the said A. B. now, at the time of the sealing and delivery of this indenture, hath in himself good right, full power, and lawful and absolute authority by these presents, to bargain,

sell, assign and assure the said pieces or parcels of land, and premises hereinbefore mentioned, and intended to be hereby assigned, with their and every of their appurtenances, unto the said C. D., his executors, administrators and assigns, in manner aforesaid, according to the true intent and meaning of these presents. AND FURTHER, that if default shall happen to be made of or in payment of the said sum of 500*l*. and the interest thereof or of any part of the same, unto the said C. D., his executors, administrators, or assigns, at the days and times and in manner hereinbefore appointed for payment thereof, contrary to the true intent and meaning of the said proviso and agreement hereinbefore for that purpose contained, then and from thenceforth it shall and may be lawful to and for the said C. D., his executors, administrators and assigns from time to time and at all times thereafter peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess and enjoy the said pieces or parcels of land and premises mentioned to be hereby assigned as aforesaid, with their and every of their appurtenances, and to have, receive, and take the rents, issues and profits thereof, and of every part and parcel thereof, to and for his and their own use and benefit, for and during all the rest, residue and remainder which shall be then to come and unexpired of the said term of twenty-one years, granted therein by the said hereinbefore in part recited indenture of lease, without the let, suit, hindrance, interruption, denial, claim, or demand whatsoever of or by the said A. B., his executors, administrators or assigns, or any of them, or any other person or persons whomsoever. AND that free and clear and freely and clearly acquitted, exonerated and discharged or otherwise by the said A. B., his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of from and against all former and other gifts, grants, bargains, sales, mortgages, assignments, rents, arrears of rent, statutes, judgments, recognizances, titles, charges and incumbrances whatsoever, (subject only to the rent, reservations, covenants and agreements by and in the said hereinbefore in part recited indenture of lease reserved and contained on the lessees' or tenants' part from thenceforth to grow due and be performed, fulfilled and kept.) AND MOREOVER that he the said A. B., his executors and administrators, and all and every other person and persons whomsoever, having or lawfully claiming, or who shall or may hereafter have or lawfully claim any estate, right, title, trust or interest at law or in equity, of in to or out of the said pieces or parcels of land and premises hereinbefore mentioned and intended to be hereby assigned as aforesaid, or any of them, or any part or parcel thereof, shall and will from time to time and at all times after default shall be made in payment of the said

sum of 500*l.* or of the interest thereof, or of any part or parts of the same, unto the said C. D., his executors, administrators or assigns, contrary to the true intent and meaning of the proviso and agreement hereinbefore for that purpose contained, upon the reasonable request of the said C. D., his executors, administrators or assigns, but at the proper costs and charges in the law of the said A. B., his executors or administrators, make, do and execute, or cause and procure to be made, done and executed, all and every such further and other lawful and reasonable act and acts, thing and things, assignments and assurances in the law whatsoever, for the further and better, more perfect and absolute assigning and assuring the said pieces or parcels of land and premises mentioned to be hereby assigned as aforesaid, with their and every of their appurtenances unto the said C. D., his executors, administrators, and assigns, for and during all the rest, residue and remainder which shall be then to come and unexpired of the said term of twenty-one years therein granted by the said hereinbefore in part recited indenture of lease (subject only to the payment of the rent and performance of the covenants and agreements by and in the said hereinbefore in part recited indenture of lease reserved and contained, and which thenceforth on the lessee's or assignee's part and behalf ought to be paid, done and performed) but freed and discharged from the proviso and condition hereinbefore contained, and all other powers, provisos, rights, equity and benefit of redemption whatsoever, as by the said C. D., his executors, administrators or assigns, or his or their counsel learned in the law, shall be reasonably advised or required. AND it is hereby agreed and declared, by and between the said A. B. and C. D., that until default shall happen to be made of or in payment of the said sum of 500*l.* and interest hereby secured as aforesaid, or some part thereof, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said A. B., his executors, administrators and assigns, to have, hold, use, occupy, possess and enjoy the said pieces or parcels of land and premises hereinbefore mentioned, and intended to be hereby assigned, with their and every of their appurtenances, and to have, receive and take the rents, issues and profits thereof to his and their own proper use, and benefit, without the let, suit, trouble, molestation, interruption, eviction, claim or demand whatsoever, of or by the said C. D., his executors, administrators or assigns, or any other person or persons whomsoever, claiming or to claim, by from or under him them or any of them. AND the said A. B., for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, that he the said A. B., his executors or administrators, shall and will from time to time and at the

usual times, so long as the said principal sum of 500*l.* or any part thereof, or the interest thereof or of any part thereof, shall remain due and owing to the said C. D., his executors, administrators or assigns, upon security of the said premises hereinbefore mentioned and intended to be hereby assigned, cause and procure, or use his and their best endeavours to procure, a new lease to be made and granted of the premises comprised in the said hereinbefore in part recited indenture of lease unto the said C. D., his executors, administrators or assigns, or unto such person or persons as he the said C. D., his executors, administrators or assigns, shall for that purpose nominate or appoint, for the term of twenty-one years, at and under the same yearly rent, and subject to the same covenants as are contained in the present subsisting lease of the same premises. And shall and will pay the fine and fines and all other charges and expenses incident to or attending every such renewal ; and that every such new lease so to be granted, and the premises therein comprised, shall stand and be a security for the payment to the said C. D., his executors, administrators or assigns, of the said principal sum of 500*l.*, or so much thereof as shall for the time being remain unsatisfied and undischarged, with interest for the same after the rate of 5*l.* for 100*l.* for a year. PROVIDED ALWAYS, and it is hereby agreed and declared that in case such new lease or leases shall not from time to time be made or granted to or for the benefit of the said C. D., his executors, administrators or assigns, as hereinbefore is mentioned, at the usual times for that purpose, in that case, and from time to time as often as it shall so happen, it shall and may be lawful to and for the said C. D., his executors, administrators or assigns, to renew the said lease, and to take a new grant or lease of the same premises for the term of twenty-one years. And that all and singular the premises in every such new lease to be comprised shall, immediately after the granting and executing the same, stand and be charged with, and be a security for the payment not only of the said principal sum of 500*l.* hereby secured, or so much thereof as shall for the time being remain unsatisfied and undischarged, and all interest then due and thenceforth to grow due for the same, but also for the payment of such sum and sums of money as the said C. D., his executors, administrators or assigns, shall pay and disburse for the fine and fees of every such renewal, and the costs and charges incident to and attending the same respectively, with interest for such fine, fees, costs and charges respectively after the rate of 5*l.* for 100*l.* for a year, to commence and be computed from the respective times of advancing and paying the same respectively. And the said A. B., his heirs, executors, administrators or assigns, shall not be admitted to a redemption of the said premises until he or they shall have paid to the



said C. D., his executors, administrators or assigns, what he or they shall pay for the fine, fees, costs and charges of every such renewal, with the interest for the same respectively, at and after the rate aforesaid, from the respective times of advancing and paying the same respectively, as well as the said principal sum of 500*l.*, or so much thereof as for the time being shall remain unsatisfied and undischarged, and the interest for the same as aforesaid. IN WITNESS, &c.

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## NO. VIII.

### RELEASE IN FEE, UPON TRUST TO SELL TO SECURE MONEY.

THIS INDENTURE made the — day of —, in the year of our Lord —, Between A. B., of, &c. of the one part, and C. D., of, &c. of the other part. WHEREAS the said A. B. is seised of or well entitled unto the inheritance in fee simple in possession of and in the messuages or tenements, pieces or parcels of land and hereditaments hereinafter mentioned, and intended to be hereby released, with the appurtenances, AND WHEREAS the said A. B. hath requested the said C. D. to lend and advance him the sum of —*l.* which he hath agreed to do upon having such security for the repayment of the same as is hereinafter contained. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and for and in consideration of the sum of —*l.* of lawful money of Great Britain by the said C. D. to the said A. B. in hand well and truly paid at or before the sealing and delivery of these presents, the receipt whereof he the said A. B. doth hereby acknowledge, and thereof and of and from the same and every part thereof doth acquit, release and discharge the said C. D., his heirs, executors and administrators, and every of them, for ever by these presents, He the said A. B. Hath granted, bargained, sold, aliened, released and confirmed, And by these presents Doth grant, bargain, sell, alien, release and confirm unto the said C. D. (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said A. B. for five shillings' consideration, by indenture bearing date the day next before the day of the date of these presents, for the term of a year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) and to his

heirs and assigns, *ALL (here insert the parcels and general words)* AND the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, AND all the estate, right, title, interest, use, trust, possession, property, possibility, claim and demand whatsoever, both at law and in equity, of him the said A. B., of, in, to or out of the same premises every or any part or parcel thereof, **TO HAVE AND TO HOLD** the said messuages or tenements, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore mentioned and intended to be hereby released, with the appurtenances, unto the said C. D., his heirs and assigns, to the use of the said C. D., his heirs and assigns, upon the trusts and to and for the intents and purposes hereinafter mentioned, expressed and declared of and concerning the same. AND it is hereby agreed and declared by and between the said parties to these presents that the said C. D., his heirs and assigns, shall stand and be seised of and interested in the said messuages or tenements, pieces or parcels of land, hereditaments and premises hereinbefore mentioned and intended to be hereby released, with the appurtenances, upon trust that he the said C. D., his heirs and assigns, do and shall permit and suffer the said A. B., his heirs and assigns, to enter into and to have, hold, use, occupy, possess and enjoy the same, and receive and take the yearly and other rents, issues and profits thereof, and of every part thereof to and for his and their own use and benefit, until the — day of — now next ensuing, And also upon trust if the said A. B., his heirs, executors, administrators or assigns, shall and do on the said — day of — now next ensuing, at, or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, well and truly pay or cause to be paid unto the said C. D., his executors, administrators or assigns, the sum of —*l.* of lawful money of Great Britain, with interest henceforth for the same after the rate of 5*l.* for 100*l.* for a year, without any deduction or abatement for taxes or otherwise howsoever, then that he the said C. D., his heirs or assigns, shall and do upon such payment being made, or at any time afterwards at the request of the said A. B., his heirs or assigns, convey and assure the said messuages or tenements, hereditaments and premises hereinbefore mentioned and intended to be hereby released with the appurtenances, unto and to the use of the said A. B., his heirs and assigns or unto such other person or persons as he or they shall direct or appoint, freed and discharged of and from all incumbrances made, done or committed by the said C. D., his heirs or assigns, in the mean time. BUT in case the said A. B., his heirs, executors, administrators and assigns, shall make default in payment of the said sum of —*l.* and interest for the same after the

rate aforesaid, or any part or parts thereof respectively, on the said — day of — now next ensuing, Then upon trust that he the said C. D., his heirs and assigns, shall immediately, upon such default being made, enter into and upon, and take possession of the said messuages or tenements, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, with the appurtenances, and do and shall sell and dispose of the same messuages or tenements, pieces or parcels of land, hereditaments and premises, either together or in parcels, and by public auction or private contract, or partly by public auction and partly by private contract, and with or without the consent or concurrence of the said A. B., his heirs or assigns, or any of them, unto any person or persons whomsoever, for the best price or prices in money that can or may be reasonably had or obtained for the same, and do and shall for that purpose enter into, make, and execute all necessary contracts with, and conveyances and assurances to the purchaser or purchasers thereof, or as he, she or they shall direct. AND IT IS HEREBY AGREED AND DECLARED that the said C. D., his heirs, executors, administrators and assigns, shall stand and be possessed of and interested in the monies to arise from the sale or sales of the said messuages or tenements, pieces or parcels of land, hereditaments and premises hereinbefore mentioned and intended to be hereby released, with the appurtenances, and the rents, issues and profits thereof after the said C. D., his heirs or assigns, shall enter into the possession or receipt of the rents and profits of the same premises, until the same shall be sold, upon the trusts and to and for the intents and purposes hereinafter mentioned, expressed and declared of and concerning the same (that is to say) Upon trust that he the said C. D., his heirs, executors, administrators and assigns, do and shall, by with and out of the clear rents, issues and profits (if any) as also the money which shall arise by and from such sale or sales respectively, in the first place deduct and retain the costs charges and expenses of and attending the execution of the trusts hereby declared, and the money which they shall respectively disburse for the taxes and repairs of the said hereditaments and premises, or in or about any suit or suits at law or in equity, for obtaining possession of the said hereditaments and premises or any of them, or carrying the trusts hereof into execution, or enforcing the performance of any contract or contracts with any person or persons who shall agree to become the purchaser or purchasers of the said hereditaments and premises, or any of them; And in the next place in payment, satisfaction, and discharge of the said sum of —£. and all interest henceforth for the same, after the rate of 5*l.* for 100*l.* for a year or so much and such part or parts of the same respectively as shall be

then remaining due and unsatisfied, and do and shall pay the residue or surplus (if any) of the said trust-monies unto the said A. B., his executors, administrators and assigns. AND it is hereby further agreed and declared by and between all and every the said parties to these presents, that the receipt or receipts of the said C. D., his heirs, executors, administrators or assigns, shall from time to time be a good and sufficient discharge and good and sufficient discharges to the purchaser or purchasers of the said several premises so to be sold as aforesaid, or any of them, or any part or parts thereof, and to his, her, and their respective heirs, executors, administrators, and assigns, for so much of the purchase money as shall be therein acknowledged to be received, and that such purchaser or purchasers, his her or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or non-application of such purchase money so received, or any part thereof. AND the said A. B. for himself, his heirs, executors, administrators, and assigns, and every of them, doth covenant, promise, and agree, to and with the said C. D., his heirs, executors, administrators, and assigns, respectively by these presents, in manner following, (that is to say) that he the said A. B., his heirs, executors, administrators, or assigns, or some or one of them, shall and will at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, well and truly pay, or cause to be paid unto the said C. D., his executors, administrators, or assigns, the sum of —*l.* of lawful money of Great Britain, with interest henceforth for the same, after the rate of 5*l.* for every 100*l.* for a year, on the — day of —, now next ensuing, without any deduction or abatement for taxes or otherwise howsoever. AND ALSO that he the said A. B. now at the time of the sealing and delivery of these presents, is and standeth lawfully, rightfully, and absolutely seised of and in all and singular the said messuages or tenements, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, with their and every of their appurtenances, of and for a good, sure, perfect, absolute and indefeasible inheritance in fee simple in possession, without any manner of condition, trust, power of revocation, remainder, or limitation of any use or uses, or other restraint, cause, matter or thing whatsoever, to alter, change, charge, defeat, revoke, make void, lessen, or incumber the same. AND also that he the said A. B. now hath in himself good right, full power, and lawful and absolute authority by these presents, to release, convey, and assure, all and singular the said messuages or tenements, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby released, and

every part and parcel thereof, with their and every of their appurtenances, unto and to the use of the said C. D., his heirs and assigns, for ever, in manner and form aforesaid, and according to the true intent and meaning of these presents. AND FURTHER, that it shall and may be lawful to and for the said C. D., his heirs and assigns, in the mean time after the said messuages or tenements, pieces or parcels of land, hereditaments, and premises hereinbefore mentioned, and intended to be hereby released, shall become saleable until the same shall be sold, and from and after such sale or sales shall be made and perfected as aforesaid, to and for the purchaser or purchasers of the same several hereditaments and premises, and his her and their respective heirs and assigns, peaceably and quietly to have, hold and enjoy the said messuages or tenements, pieces or parcels of land, hereditaments, and premises hereinbefore mentioned, and intended to be hereby released, with their and every of their appurtenances, and the rents, issues, and profits thereof, to receive and take unto him the said C. D. upon the trusts aforesaid, and unto such purchaser or purchasers, his her and their heirs and assigns, to his her and their own use and benefit, without any lawful let, suit, trouble, hindrance, eviction, expulsion or interruption, of or by the said A. B., his heirs or assigns, or any other person or persons whomsoever. AND that free and clear and freely and clearly acquitted, exonerated and discharged, or otherwise, by the said A. B., his heirs, executors, administrators and assigns, or some or one of them, from time to time and at all times hereafter, well and sufficiently saved, defended, kept harmless and indemnified, of from and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, trusts, wills, intails, statutes, recognizances, judgments, extents, executions, rents, arrears of rent, annuities, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed or suffered, or to be had, made, done, committed or suffered by him the said A. B., his heirs or assigns, or any other person or persons whomsoever. AND MOREOVER that he the said A. B. and his heirs, and all and every other person and persons whomsoever, having or lawfully claiming, or who shall or may at any time hereafter have or lawfully claim any estate, right, title, trust or interest, of in, to, or out of the said messuages or tenements, pieces or parcels of land, hereditaments and premises, hereinbefore mentioned, and intended to be hereby released, or any part or parcel thereof, shall and will from time to time and at all times hereafter, at and upon the reasonable request of the said C. D., his heirs, executors, administrators or assigns, but at the costs and charges

in the law of the said A. B., his heirs or assigns, until a sale or sales shall be made of the said messuages or tenements, pieces or parcels of land, hereditaments and premises, hereinbefore mentioned, and intended to be hereby released, and from and after such sale or sales, at the request, costs, and charges of the said purchaser or purchasers of the same hereditaments and premises, his her or their heirs or assigns, make, do, acknowledge, levy, suffer and execute, or cause and procure to be made, done, acknowledged, levied, suffered and executed, all and every such further and other lawful and reasonable act and acts, thing and things, deeds, devises, conveyances and assurances in the law whatsoever, for the further, better, more perfect and absolute granting, releasing, assuring and confirming all and singular the said messuages or tenements, pieces or parcels of land, hereditaments and premises, hereinbefore mentioned, and intended to be hereby released, with their and every of their appurtenances, unto and to the use of the said C. D., his heirs and assigns, upon the trusts and to and for the intents and purposes hereinbefore mentioned, expressed and declared, of and concerning the same, until such sale or sales as aforesaid; and from and after such sale or sales, unto and to the use of the purchaser or purchasers of the same hereditaments and premises, his her or their heirs and assigns, as by the person or persons requesting any such further assurance or assurances to be made, his her their or any of their counsel learned in the law, shall be lawfully and reasonably devised or advised and required. AND MOREOVER, that he the said A. B., his heirs, executors, administrators and assigns, shall and will join and concur in the making of any sale, to be made or proposed to be made by the said C. D., his heirs or assigns, under or by virtue of the trusts hereinbefore contained, and in executing the several conveyances and assurances of the said messuages or tenements, pieces or parcels of land, hereditaments and premises, to the purchaser or purchasers thereof, or of any of them, and enter into all usual and reasonable covenants with such purchaser and purchasers, his her and their heirs and assigns, for the estate, title, possession and further assurance of the said premises, or such of them as shall be so sold, or do any other reasonable act or acts for confirming such sale or sales. Nevertheless it is hereby agreed and declared that the joining of the said A. B., his heirs, executors, administrators or assigns, in any such sale or sales, conveyance or conveyances as aforesaid, shall not in any wise be deemed or considered as essential or necessary to perfect the title of the purchaser or purchasers of the said hereditaments and premises, or any part thereof, the same being intended only for the further satisfaction of such purchaser or purchasers. IN WITNESS, &c.

## No. IX.

## ASSIGNMENT OF A TERM ON A MORTGAGE.

THIS INDENTURE made the       day of       in the year of our Lord 18   BETWEEN E. F. of, &c. of the first part, A. B. of, &c. of the second part, C. D. of, &c. of the third part, and G. H. of, &c. of the fourth part. WHEREAS by a certain Indenture of Mortgage bearing date on or about the       day of       which was in the year of our Lord       and made or expressed to be made between I. K. of, &c. of the one part, and L. M. of, &c. of the other part. IT IS WITNESSED, that for the considerations therein mentioned, the said I. K. did demise, grant, bargain and sell, unto the said L. M., his executors, administrators and assigns, the messuage or tenement, pieces or parcels of land and hereditaments hereinafter mentioned and described, To hold the same unto the said L. M., his executors, administrators and assigns thenceforth for the term of 1000 years, at a peppercorn rent, subject nevertheless to a proviso or agreement therein contained, for redemption of the said premises, on payment by the said I. K., his heirs, executors, administrators or assigns, to the said L. M., his executors, administrators or assigns, of the sum of —£. and interest, after the rate at the times and in manner therein mentioned, which money was not paid accordingly. AND WHEREAS by divers mesne assignments or otherwise the said premises comprised in the said term of 1000 years have become vested in the said E. F. for the residue of the same term upon trust to attend the inheritance. AND WHEREAS by Indentures of Lease and Release, the Lease bearing date the day next before the day of the date of the Release, and the Release bearing even date with these presents, and made or expressed to be made between the said A. B. and E. his wife, of the one part, and the said C. D. of the other part, the inheritance in fee simple of and in ALL, &c. (*describe the parcels*) being the premises comprised in the said term of 1000 years, hath for the considerations therein mentioned been conveyed and assured unto and to the use of the said C. D., his heirs and assigns for ever, subject nevertheless to a proviso or agreement therein contained, for redemption of the said premises, on payment by the said A. B., his heirs, executors or administrators, to the said C. D., his exe-

cutors, administrators or assigns, of the sum of —*l.* with interest for the same, after the rate at the times and in manner therein mentioned. AND WHEREAS it hath been agreed that the said messuage or tenement, pieces or parcels of land, hereditaments and premises, so conveyed and assured unto and to the use of the said C. D., his heirs and assigns for ever, as aforesaid, shall be assigned by the said E. F. unto the said G. H., his executors, administrators and assigns, for all the residue and remainder of the said term of 1000 years, now to come and unexpired therein, upon trust for the said C. D., his executors, administrators and assigns, and to attend the freehold and inheritance of the same premises in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of 10*s.* of lawful money of Great Britain by the said G. H. to the said E. F. in hand well and truly paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, He the said E. F. at the request and by the direction of the said A. B., and at the nomination and appointment of the said C. D. testified by their severally being parties to and respectively executing these presents, Hath bargained, sold, assigned, transferred and set over, And by these presents Doth bargain, sell, assign, transfer and set over unto the said G. H., his executors, administrators and assigns, The said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises in and by the said recited indentures of lease and release conveyed and assured unto and to the use of the said C. D., his heirs and assigns for ever, as aforesaid, with the appurtenances, And all the estate, right, title, interest, term and terms for years yet to come and unexpired, trust, possession, property, possibility, claim and demand whatsoever, both at law and in equity, of him the said E. F. of in to or out of the same premises, every or any part thereof, TO HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore mentioned, and intended to be hereby assigned, with the appurtenances, unto the said G. H., his executors, administrators and assigns, henceforth for and during all the rest, residue and remainder of the said term of 1000 years yet to come and unexpired therein, In Trust, nevertheless for the said C. D., his executors, administrators and assigns, for better securing to him and them the payment of the said sum of —*l.* with interest for the same, after the rate at the times and in manner in the said hereinbefore in part recited indentures of lease and release mentioned and appointed for payment of the same, and from and after payment of the said sum of —*l.* and interest, and subject in the mean time thereto,



In Trust for the said A. B., his heirs and assigns, to be disposed of as he or they shall direct or appoint, and in the mean time to attend the reversion, freehold and inheritance of the same premises, in order to protect the same from all mesne charges and incumbrances (if any such there be.) AND the said E. F. doth hereby for himself, his heirs, executors and administrators, covenant and declare to and with the said G. H., his executors, administrators and assigns, that he the said E. F. hath not done or committed or wittingly or willingly suffered to be done, or been party or privy to the doing of any act, matter or thing whatsoever, whereby, wherewith or by reason or means whereof the said messuage or tenement, pieces or parcels of land, hereditaments and premises hereinbefore mentioned, and intended to be hereby assigned, or the said term of 1000 years, therein, or any part thereof respectively, are, is, can, shall or may be surrendered, forfeited, avoided, impeached, charged, assigned, incumbered or affected in title, estate or otherwise howsoever. IN WITNESS, &c.

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## No. X.

### APPOINTMENT OF A RECEIVER FOR A MORTGAGE. (a)

THIS INDENTURE made the 28th day of September, in the year of our Lord 1821, BETWEEN C. D. of, &c. of the first part, A. B. of, &c. of the second part, and E. F. of, &c. of the third part. WHEREAS by indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing even date with these presents, and made or expressed to be made between the said A. B. and E. his wife, of the one part, and the said C. D. of the other part, for the considerations therein mentioned, the said A. B. hath granted, bargained, sold, aliened, released and confirmed unto the said C. D., his heirs and assigns, ALL, &c. (*describe the parcels*) To HOLD the same, with their and every of their appurtenances, unto and to the use of the said C. D., his heirs and assigns for ever, but subject nevertheless to a proviso or agreement in the said indenture now in recital, contained for redemption of the said premises, on payment by the said A. B., his heirs, executors, administrators or assigns, unto the said C. D., his executors, administrators

(a) Ante 149. and see Addenda to p. 82. l. 9.

or assigns, of the sum of ——*l.* with interest for the same, after the rate at the times and in manner therein mentioned. AND WHEREAS upon the treaty for the loan of the said sum of ——*l.*, it was proposed and agreed by and between the said A. B. and C. D. that for securing the punctual and regular payment of the interest thereof, as it should become due, a receiver should from time to time be appointed for collecting and receiving the rents and profits of the said messuage or tenement, pieces or parcels of land, hereditaments and premises comprised in the said recited indenture of release and mortgage, and that the said E. F. party hereto should be the first receiver thereof. NOW THEREFORE THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for securing the punctual and regular payment of the interest of the said sum of ——*l.* from time to time as the same shall become due, he the said C. D. and also the said A. B. at the nomination, and by and with the consent and approbation of the said C. D. testified by his being a party to and sealing and delivering these presents, Have and each of them Hath made, ordained, constituted and appointed, And by these presents Do and each of them Doth make, ordain, constitute and appoint the said E. F. their receiver, agent and attorney from time to time to get in and receive all and every the rents, issues and profits of all and singular the said messuage or tenement, pieces or parcels of land, hereditaments and premises, so mortgaged to the said C. D. as aforesaid, of and from the several and respective tenants and lessees thereof, when and as the same shall from henceforth become due and payable, and upon payment thereof or of any part thereof to make and give proper acquittances and discharges for the same; and in case of non-payment thereof, or of any part thereof, to take such lawful remedies by action, suit, distress or otherwise for the recovery of the same as shall be requisite or necessary in that behalf, and to do, perform and execute all other acts, matters or things needful and necessary for collecting, receiving and getting in the same rents and profits, and every part thereof. AND it is hereby declared and agreed by and between the said parties to these presents, that all and every the rents, issues and profits which shall be received by the said E. F. in pursuance of these presents, shall be applied and disposed of upon the trusts, and to and for the ends, intents and purposes hereinafter expressed and declared (that is to say) Upon Trust that he the said E. F. shall and do from time to time in the first place pay and satisfy unto the said C. D., his executors, administrators and assigns, all interest from time to time to grow due for the said sum of ——*l.* or any part thereof, at such time, and in such manner as in and by the said recited indenture of release and mortgage is and are mentioned and ap-

pointed for that purpose, and shall and do in the next place render and pay over unto the said A. B., his heirs and assigns, or such other person or persons as shall be entitled thereto, all the clear residue of the rents, issues and profits of the said premises, so to be collected and received as aforesaid, over and above what shall from time to time be paid and applied in satisfaction of such interest as aforesaid, and the necessary charges and expences of him the said E. F. in collecting, receiving, paying or remitting such rents, issues and profits as aforesaid. AND the said E. F. for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, and also to and with the said A. B., his heirs, executors, administrators and assigns, that he the said E. F. shall and will during so long time as the said sum of —l. or any part thereof shall continue charged and secured upon the said premises as aforesaid, and as he shall continue collector and receiver of the rents and profits thereof, duly and punctually pay and apply or cause or procure to be paid and applied upon the trusts, and for the ends, intents and purposes aforesaid, all such sum and sums of money as shall from time to time be received or collected by him the said E. F. or any other person or persons by his appointment by virtue of or under this present authority. AND the said A. B. for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, by these presents, in manner following, (that is to say) that he the said A. B., his heirs or assigns, shall not, nor will at any time hereafter, without the consent of the said C. D., his executors, administrators or assigns first had and obtained for that purpose in writing under his or their hand and seal or hands and seals, revoke, alter or make void the powers or authorities hereby given to the said E. F., nor do commit or suffer or cause to be committed or suffered any act, matter or thing whereby the powers and authorities hereby given or any of them may become void, or the said E. F. or any future receiver to be appointed, as hereinafter is mentioned, may be obstructed or interrupted in or prevented from collecting or receiving the rents, issues and profits of the said premises upon the trusts and for the purposes aforesaid, during such time as the said sum of —l., or any part thereof, shall be owing and unpaid. AND further, that if the said E. F. shall happen to die, or shall be rendered incapable to collect and receive the rents, issues and profits of the said premises, or shall neglect or refuse to act or proceed therein in manner aforesaid, during such time as the said principal sum of —l. or any part thereof or any interest for the same shall be owing or unpaid, or shall otherwise misbehave himself in relation to the

trusts hereby in him reposed, then and in any of the said cases he the said A. B., his heirs and assigns, shall and will join and concur with the said C. D., his heirs, executors, administrators and assigns, in removing the said E. F. from the said office or employment, and in constituting and appointing some other person or persons to receive, collect and manage the rents and premises upon the trusts aforesaid, and so from time to time as often as any of the like cases shall happen until the said principal sum of —£., and all interest for the same, shall be paid and satisfied. AND also that in case he the said A. B., his heirs or assigns, shall refuse or neglect in any of the cases beforementioned to join with the said C. D., his executors, administrators or assigns, in constituting or appointing some other fit person or persons to receive and collect the rents and profits aforesaid, or any part thereof, then and in such case and from time to time as often as it shall so happen it shall and may be lawful to and for the said C. D., his executors, administrators or assigns, without the said A. B. his heirs or assigns, to constitute and appoint some fit person or persons to receive, collect and manage the said rents, issues and profits upon the trusts and for the purposes aforesaid. AND it is hereby declared and agreed by and between all the said parties to these presents, and particularly the said A. B. doth hereby declare and agree that the said C. D., his heirs, executors, administrators or assigns, shall not be charged or chargeable with or accountable for any loss or misapplication of the rents and profits arising and to be received from or out of the said messuage or tenement, pieces or parcels of land, hereditaments and premises, or any part thereof, by reason or means of any neglect, default or breach of trust in the said E. F., or any future collector or receiver of the same rents, issues and profits, or by any other means or occasion whatsoever, but that such loss and misapplication shall be wholly sustained and made good by the said A. B., his heirs, executors or administrators; AND it is hereby further agreed and declared by and between all the said parties to these presents, that the said E. F. shall not be answerable or accountable for any sum or sums of money other than and except only such as he shall actually receive. AND that it shall and may be lawful to and for the said E. F., so long as he shall continue collector and receiver of the rents, issues and profits of the said premises, after paying unto the said C. D., his executors, administrators or assigns, all interest that shall grow due to him or them in respect of the said sum of —£. as aforesaid, to retain and take to his own use all such costs, charges and expences, as he shall necessarily sustain or be put unto in collecting the said rents and profits of the said premises, and in executing, doing and performing the several other trusts, matters and things hereinbefore contained as aforesaid,

PROVIDED ALWAYS, and it is hereby also agreed and declared by and between the said parties to these presents, that in case there shall not at any time hereafter during so long time as the said sum of —*l.* or any part thereof shall remain due and owing to the said C. D., his executors, administrators or assigns, upon or by virtue of the said in part recited mortgage security be six months' interest in arrear and unpaid to the said C. D., his executors, administrators or assigns, then and in such case it shall and may be lawful to and for the said A. B., or such other person or persons as he shall from time to time authorize and appoint to collect and receive the rents and profits of the said messuage or tenement, pieces or parcels of land, hereditaments and premises, without the lawful let, suit, trouble, interruption, disturbance, claim or demand of the said E. F., or such future or other person or persons as shall in pursuance of the provisos or covenants hereinbefore contained be appointed to receive the rents and profits for the intents and purposes hereinbefore mentioned, it being the true intent and meaning of the said A. B. and C. D. respectively that the said E. F. and every future receiver so to be appointed as aforesaid shall only from time to time enter and receive the said rents and profits when and so often as six months' interest shall be in arrear and unpaid to the said C. D., his executors, administrators and assigns, for or in respect of the said sum of —*l.*, or so much thereof as shall remain due or owing to him or them upon or by virtue of the said in part recited mortgage-security so bearing equal date herewith as aforesaid.—IN WITNESS, &c.

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## No. XI.

DEED of FURTHER CHARGE on a MORTGAGE making Interest Principal, and securing a further advance.

THIS INDENTURE, made, &c. Between the within-named A. B. of the one part, and the within-named C. D. of the other part. WHEREAS the principal sum of —*l.* secured to the said C. D. by the within-written indenture still remains due and owing to him upon or by virtue of the same indenture, and there is now due and owing to the said C. D. for the interest of the said principal sum the sum of —*l.* AND WHEREAS the said A. B. hath requested the said C. D. to lend and advance him the further sum of —*l.* which he hath agreed to do upon having

the repayment thereof together with interest secured to him by a further charge upon the hereditaments comprised in the within written indenture. And it hath also been agreed between the said parties hereto, that the said sum of —l. so due and owing for arrears of interest as aforesaid shall be considered as principal money and carry interest after the rate of 5*l.* for 100*l.* for a year, and be secured in like manner by a further charge upon the said hereditaments. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and for and in consideration of the sum of —l. of lawful money of Great Britain by the said C. D. to the said A. B. in hand well and truly paid, at or before the sealing and delivery of these presents, the receipt whereof he the said A. B. doth hereby acknowledge, and thereof and of and from the same and every part thereof doth acquit, release and discharge the said C. D., his heirs, executors, administrators and assigns, and every of them for ever, by these presents, and for securing the repayment of the said sum of —l. as well as of the said sum of —l. so due and owing for arrears of interest as aforesaid, making together the sum of —l. with interest, he the said A. B. doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, That the messuages or tenements, lands and hereditaments, and all and singular other the premises mentioned and comprised in the within-written indenture, and thereby granted and conveyed in mortgage unto and to the use of the said C. D., his heirs and assigns, as therein mentioned, and every part and parcel thereof, with their and every of their rights, members and appurtenances, shall henceforth stand and be a security for and charged and chargeable with as well the payment of the said sum of —l. (*amount of money advanced and arrears of interest*) with interest henceforth for the same after the rate of 5*l.* for 100*l.* for a year, from the day of the date of these presents, as with the payment of the said sum of —l. (*money secured by the mortgage*) with interest for the same after the rate aforesaid. And that he the said A. B., his heirs, executors, administrators or assigns, shall not redeem or endeavour to redeem the said mortgaged premises or any part thereof until payment as well of the said sum of —l. (*amount of money advanced and arrears of interest*) and interest after the rate aforesaid, as of the said sum of —l. (*money secured by the mortgage*) with the interest henceforth to grow due for the same as aforesaid. AND the said A. B., for himself, his heirs, executors, administrators and assigns doth further covenant, promise and agree to and with the said C. D., his executors, administrators and assigns, by these presents, that he the said A. B., his heirs, executors, administrators or assigns, shall and will upon demand

well and truly pay or cause to be paid unto the said C. D., his executors, administrators or assigns, the said sum of —*l.* (*amount of money advanced and arrears of interest*) with interest henceforth for the same after the rate of 5*l.* for 100*l.* for a year, without any deduction or abatement out of the same or any part thereof, for or in respect of any taxes, charges or assessments, taxed, charged, assessed or imposed, or to be taxed, charged, assessed or imposed upon the said premises or any part thereof, or upon the said sum of —*l.* and interest or any part thereof, or upon the said C. D., his heirs, executors, administrators or assigns in respect thereof, by authority of parliament or otherwise howsoever. IN WITNESS, &c.

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## No. XII.

### ASSIGNMENT OF A MORTGAGE. (a)

THIS INDENTURE, made, &c. Between C. D., of, &c. of the first part, E. F., of &c. of the second part, and A. B., of, &c. of the third part. WHEREAS by indentures of lease and release bearing date respectively the — and — days of —, which was in the year of our Lord —. The release being made or expressed to be made between the said A. B. of the one part, and the said C. D. of the other part: It is Witnessed that for the considerations therein mentioned the said A. B. did grant, bargain, sell, alien, release and confirm unto the said C. D., his heirs and assigns, All, &c. (*describe the parcels*) To Hold the same, with their and every of their appurtenances, unto and to the use of the said C. D., his heirs and assigns for ever, but subject nevertheless to a proviso or agreement in the said indenture now in recital contained for redemption of the said premises on payment by the said A. B., his heirs, executors, administrators, or assigns, unto the said C. D., his executors, administrators or assigns, of the sum of —*l.* with interest for the same after the rate, at the times and in manner therein mentioned, which money was not paid accordingly. And whereas there is now due and owing to the said C. D. upon his said recited mortgage-security, the said principal sum of —*l.* together with interest for the same from the — days of — now last past, as be the said A. B. doth hereby acknowledge. AND WHEREAS the said C. D. hath contracted and agreed to

(a) Antc, p. 128, 129, 130.

and with the said E. F. for the assignment or transfer to him of the said sum of —£. and interest from the — day of — now last past, and the said recited mortgage-security at or for the price or sum of —£. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of —£. of lawful money of Great Britain by the said E. F. to the said C. D. in hand well and truly paid at or before the sealing and delivery of these presents, the receipt whereof he the said C. D. doth hereby acknowledge, and thereof and of and from the same and every part thereof doth acquit, release and discharge the said E. F., his executors, administrators and assigns, and every of them for ever by these presents, He the said C. D., with the privity of the said A. B., testified by his being a party to and executing these presents, Hath bargained, sold, aliened, released and confirmed, And by these presents Doth bargain, sell, alien, release and confirm unto the said E. F., (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said C. D. for five shillings' consideration, by indenture bearing date the day next before the day of the date of these presents for the term of a year commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) and to his heirs and assigns The said — hereditaments and all and singular other the premises mentioned, described and comprised in the said hereinbefore in part recited indenture of release and mortgage of the — day of — and thereby released or mentioned and intended so to be, with their and every of their appurtenances, And all the estate, right, title, interest, use, trust, possession, property, possibility, claim and demand whatsoever both at law and in equity of him the said C. D. of in to or out of the same premises, every or any part or parcel thereof, Together with the said recited indentures of lease and release and mortgage, and all other deeds, evidences and writings relating to the said premises in the possession of the said C. D. To HAVE AND TO HOLD the said — hereditaments and premises hereinbefore mentioned and intended to be hereby released with their appurtenances unto the said E. F., his heirs and assigns, to the use of the said E. F., his heirs and assigns for ever, but subject nevertheless to such right and equity of redemption as is now subsisting of or concerning the same premises under or by virtue of the said hereinbefore in part recited indenture of release and mortgage of the — day of —. AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of the said agreement and for the consideration aforesaid He the said C. D., with the privity of the said A. B. testified by his being a party to and



executing these presents, Hath bargained, sold, assigned, transferred and set over, And by these presents Doth bargain, sell, assign, transfer and set over unto the said E. F., his executors, administrators and assigns, the said principal sum of ——*l.* secured by the said hereinbefore in part recited indenture of release and mortgage, and all interest now due and henceforth to become due for the same, and all bonds, covenants and other securities for the same principal sum and interest ; **TO HAVE, HOLD, RECEIVE, TAKE AND ENJOY** the said principal sum of ——*l.* and interest, bonds, covenants and other securities hereinbefore mentioned and intended to be hereby assigned unto the said E. F., his executors, administrators and assigns, to and for his and their own absolute use and benefit. **AND** for the better effectuating the purposes aforesaid, He the said C. D. Hath nominated, constituted and appointed, And by these presents Doth nominate, constitute and appoint the said E. F., his executors, administrators and assigns, his true and lawful attorney and attorneys for him and in his name, or in the name or names of the said E. F., his executors, administrators or assigns, or otherwise to ask, demand, sue for, recover and receive of and from all and every person or persons liable or entrusted to pay the same the said principal sum of ——*l.* and interest hereinbefore mentioned and intended to be hereby assigned, and to give acquittances or to make and execute any other release or discharge for the same, and further to do and execute all other acts and things whatsoever which shall be necessary or expedient to be done in or about the premises as fully and effectually to all intents and purposes as he the said C. D. might or could do if personally present. **AND** the said C. D. for himself, his heirs, executors and administrators, doth covenant and declare to and with the said E. F., his heirs, executors, administrators and assigns, by these presents, that he the said C. D. hath not done or committed, or wittingly or willingly permitted or suffered to be done, or been party or privy to the doing of any act, deed, matter or thing whatsoever whereby wherewith or by reason or means whereof the said several premises hereinbefore mentioned and intended to be hereby released and assigned, or any part or parts thereof, respectively are or can shall or may be assigned, released, charged, impeached, incumbered or affected in title, estate or otherwise howsoever.—**IN WITNESS, &c.**

## No. XIII.

## RELEASE OF AN EQUITY OF REDEMPTION. (a)

By a Mortgagor to the Mortgagee.

THIS INDENTURE, made, &c. 1821, between A. B. of, &c. of the one part and C. D., of, &c. of the other part. WHEREAS by certain indentures of lease and release and mortgage, bearing date respectively the ——— and ——— days of ——— which was in the year of our Lord 1820, the release being made or expressed to be made between the said A. B. of the one part, and the said C. D. of the othet part. It is Witnessed that for the considerations therein mentioned the said A. B. did grant, bargain, sell, alien, release and confirm unto the said C. D., his heirs and assigns, ALL, &c. (*describe the parcels*) To Hold the same with their and every of their appurtenances unto and to the use of the said C. D., his heirs and assigns, for ever; But subject nevertheless to a proviso or agreement in the said indenture now in recital contained for redemption of the said premises on payment by the said A. B., his heirs, executors, administrators or assigns, unto the said C. D., his executors, administrators or assigns, of the sum of ———*l.*, together with interest for the same after the rate at the times and in manner therein mentioned, which money was not paid accordingly. AND WHEREAS there is now due and owing unto the said C. D. upon the said hereinbefore in part recited indenture of release and mortgage the sum of ———*l.* only, but all interest for the same hath been paid off and discharged up to the day of the date of these presents, as he the said C. D. doth hereby acknowledge and admit. AND WHEREAS the said C. D. hath contracted and agreed with the said A. B. for the absolute purchase of all right, power or equity of redemption which he the said A. B. now hath or can claim of in or to the said ——— hereditaments and premises hereinbefore mentioned and described and comprised in the said hereinbefore in part recited indenture of release and mortgage of the day of ——— 1820, at or for the price or sum of ———*l.* (b) NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and for and in consideration of the sum of ———*l.* of lawful money of Great Britain by the said C. D. to the

(a) Ante, p. 117.

(b) Ante, p. 153.

said A. B. in hand well and truly paid at or before the sealing and delivery of these presents, the receipt whereof he the said A. B. doth hereby acknowledge, and that the same is in full for the purchase of all right, power or equity of redemption which he the said A. B. now hath or can claim of in or to the said ——— hereditaments and premises, hereinbefore mentioned and described, and comprised in the said hereinbefore in part recited indenture of release and mortgage of the ——— day of ———, 1820, and thereof and of and from the same and every part thereof, doth acquit, release and discharge the said C. D., his heirs, executors, administrators and assigns, and every of them, for ever by these presents; and for extinguishing all right, power and equity of redemption whatsoever of and in the said mortgaged premises, He the said A. B. Hath granted, remised, released, extinguished, quit claimed and confirmed; And by these presents Doth grant, remise, release, extinguish, quit claim and confirm unto the said C. D., his heirs and assigns, for ever, ALL those the said ——— hereditaments and premises hereinbefore mentioned and described, and comprised in the said hereinbefore in part recited indenture of release and mortgage of the ——— day of ———, 1820, and thereby released or mentioned and intended so to be, with their and every of their rights, members and appurtenances; And the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof; And all the estate, right, title, interest, use, trust, possession, property, possibility, claim and demand whatsoever, both at law and in equity, of him the said A. B., of in to or out of the same premises, every or any part or parcel thereof. **TO HAVE AND TO HOLD** the said ——— hereditaments and premises hereinbefore mentioned and described, and intended to be hereby granted and released, with the appurtenances, unto the said C. D., his heirs and assigns, to the only proper use and behoof of the said C. D., his heirs and assigns, for ever, absolutely foreclosed and debarred of and from the proviso or agreement hereinbefore mentioned to have been contained in the said hereinbefore in part recited indenture of release and mortgage, and of and from all right, power or equity of redemption, by virtue or colour thereof or otherwise howsoever.—(*Usual covenants for title.*)—IN WITNESS, &c.

## No. XIV.

NOTICE by a MORTGAGEE not to pay RENT to the MORTGAGOR.

SIR,

TAKE notice that by indentures of lease and release, bearing date respectively the ——— and ——— days of ——— 18— the release being made between A. B., of, &c. and E. his wife, of the one part, and C. D., of, &c. of the other part, the messuage or dwelling house, lands and premises now in your occupation, situate and being in the parish of ———, in the county of ———, were conveyed and assured to the said C. D., for securing the payment of the sum of ———*l.* and interest by the said A. B. to the said C. D. at a certain time in the said indenture of release mentioned, and now past, and which said sum of ———*l.* with a considerable arrear of interest thereon, is still due and unpaid to the said C. D., I do therefore, as the attorney of and for the said C. D., hereby give you notice not to pay any rent now due or hereafter to become due from you for the said messuage or dwelling house, land and premises, to the said A. B., or to any other person or persons than to the said C. D., or to me as his attorney, or to such other person or persons as shall be duly authorized by him to receive the same. Dated the ——— day of ———, 18—.

Yours, &c.

E. F.

# I N D E X.

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## A.

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